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No. _____ OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1996

LEONARD C. McNEMAR,
Petitioner,

v.

THE DISNEY STORES, INC.,
Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Judicial estoppel is a common law preclusion doctrine that allows a court to bar a party from asserting a position before it that contradicts a position the party has taken elsewhere at a previous time. The question presented here is:

Whether the use of judicial estoppel to deny trial to an AIDS victim discharged in violation of the Americans With Disabilities Act comports with his rights under the Due Process Clause of the Fourteenth Amendment and the Seventh Amendment to the Constitution of the United States.

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PETITION FOR WRIT OF CERTIORARI

Leonard C. McNemar ("McNemar") respectfully prays that a writ of certiorari issue from this Honorable Court to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this action on July 31, 1996, and to resolve the division among the Circuit Courts of Appeals as to the acceptance and application of the doctrine of judicial estoppel by exercise of its supervisory power.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 91 F.3d 610 (3d Cir. 1996). A copy of this decision is attached to this Petition as Appendix A ("App. A"). Attached as Appendix B ("App. B") is a copy of the Order filed by the Court of Appeals on September 16, 1996, denying petitioner's Petition for Rehearing and Suggestion for Rehearing *en banc*. The June 29, 1995 Opinion and Order of the District Court for the Eastern District of Pennsylvania is reported at 4 A.D. Cases 897 (E.D.Pa. 1995) and can also be found at 1995 WL 390051. A copy is attached to this Petition as Appendix C ("App. C").

JURISDICTION

The District Court granted summary judgment to defendant, The Disney Store, Inc., on June 29, 1995. Timely appeal was taken by plaintiff, Leonard C. McNemar, to the United States Court of Appeals for the Third Circuit. The Court of Appeals affirmed the District Court's grant of summary judgment by Order and Opinion of July 31, 1996. A timely Petition for Rehearing and Suggestion for Rehearing *en banc* was denied by Order of September 16, 1996. Pursuant to Supreme Court Rule 13.3, this Petition was filed within 90 days of the denial of rehearing.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Jurisdiction was vested in the Court of Appeals pursuant to 28 U.S.C. § 1291. The District Court's jurisdiction was founded on 28 U.S.C. § 1331.

STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that

> No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law[.]

The Seventh Amendment to the United States Constitution provides as follows:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331. The court granted summary judgment to defendant Disney Stores on plaintiff McNemar's claims under the Americans With Disabilities Act ("ADA")[42 U.S.C. §§ 12101, *et seq.*]. The Court held that McNemar was estopped pursuant to the doctrine of judicial estoppel (also called "the preclusion of inconsistent positions" and "estoppel by oath") from claiming that he was a "qualified individual with a disability" under the ADA, *i.e.*, "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions" of the job at issue. 42 U.S.C. § 12111(8). The estoppel was based on McNemar's sworn statements in printed application forms for disability benefits that he was "disabled" and "unable to work." The Court held that McNemar's application statements precluded him from arguing that he was "a qualified individual with a disability," and that, therefore, he could not make out a *prima facie* case as required under the ADA. The Court of Appeals for the Third Circuit

affirmed the decision on the same judicial estoppel grounds.[1]

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[1] This is not a case where summary judgment would have been appropriate even absent the application of judicial estoppel. McNemar, an Assistant Manager at a Disney Store, was hospitalized with AIDS in mid-October, 1993 while on vacation. He returned to work on October 25. On November 8, 1993, his District Manager called him into her office and asked directly, "Are you HIV-positive?," in direct violation of 42 U.S.C. § 12112(d)(4)(A). Fearing he would lose his job, he denied it. Ten days later he was again summoned and accused of misusing two dollars ($2) in violation of Disney cash-handling policies. McNemar begged not to lose his job, because (he then admitted) he had AIDS and needed the medical coverage his employer provided. Despite these pleas, the District Manager, after approval from Disney headquarters, fired McNemar and canceled his medical benefits. A fact question, of course, remains as to whether such firings were usual Disney practice under those circumstances.

When he applied for unemployment compensation, McNemar was told that Disney had not made the requisite contributions to the compensation fund, and his claim was denied. McNemar was told by Social Security and New Jersey state welfare personnel that AIDS was a "presumptive disability" and that he could apply for and receive disability benefits even though he was capable of work. His two treating physicians likewise advised him that it was proper to apply. He did so, signing state and federal printed application forms stating that he was "disabled" and "unable to work." He sought work in the period thereafter. It is not disputed that McNemar had been working without any limitations up through the time of firing. The applications for benefits were the only evidence that McNemar could not work.

REASONS FOR ALLOWANCE OF THE WRIT

I. THE VAGUENESS AND ARBITRARINESS OF THE DOCTRINE OF JUDICIAL ESTOPPEL, WHICH DIVIDES THE COURTS OF APPEALS BOTH AS TO ITS ACCEPTANCE AND ITS ELEMENTS, VIOLATES PETITIONER'S DUE PROCESS RIGHTS.

A. Introduction and Background of the Doctrine

The use of judicial estoppel against ADA claimants who have applied for or received disability benefits is a devastating new use for this obscure and amorphous but rarely used doctrine. In recent years it has been a favorite defense weapon used by employers in ADA cases filed by any employee or job seeker with a disability who has applied for or received disability benefits. Increasingly, it is being used by courts to deprive persons with disabilities of trial on the merits as a sanction against (perceived) inconsistency.[2] As the Honorable Learned Hand pointed out in rejecting the doctrine of judicial estoppel, "Judgment by estoppel is not designed as a moral sanction against inconsistency ." *Bertha Building Corp. v. National Theatres Corp.*, 248 F.2d 833, 837 (2d Cir. 1957)(Learned Hand, J. dissent). It is estimated that there are some forty-three million Americans with disabilities. 42 U.S.C. 12101 (1994). Some one million of them are Social Security recipients who are properly and legally working while receiving benefits [55

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[2] *See, e.g., Cline v. Western Horseman, Inc.*, 922 F.Supp. 442 (D.Colo. 1996); *Simo v. Home Health & Hospice Care*, 906 F.Supp. 714 (D.N.H. 1995); *Nguyen v. IPB, Inc.*, 905 F.Supp. 1471 (D.Kan. 1995); *Muellner v. Mars, Inc.*, 714 F.Supp. 351 (N.D.Ill. 1989).

Soc.Sec.Bulletin (No.1) 26 (Spring, 1992)]. In light of the seventy-two thousand complaints of disability discrimination received by the EEOC since the effective date of the ADA, the number of potential victims of the misuse of the judicial estoppel doctrine is literally enormous.

Judicial estoppel, sometimes called the doctrine against the assertion of inconsistent positions or estoppel by oath, "prevents a litigant from attempting to assert a position inconsistent with one that he has asserted in a previous judicial proceeding." Douglas W. Henkin, *Judicial Estoppel--Beating Shields Into Swords And Back Again*, 139 U.Pa.L.Rev. 1711, 1711 (1991). Judicial estoppel began to develop in the mid-1800's, in the era before the modern Federal Rules, to promote the broad public policy objectives of protecting the integrity of the judicial system and upholding the sanctity of the oath. Its aim was to prevent a litigant from "playing fast and loose with the courts" by "speaking out of both sides of his mouth," and to prevent a litigant from obtaining inconsistent results by winning before one court on one assertion and before another court on a contradictory assertion.

B. The Circuits Are Split as to the Acceptance of the Doctrine.

The very lack of definition of the doctrine of judicial estoppel divides the Circuits and the unguided discretion it arbitrarily confers violates a litigant's due process and seventh amendment rights. The differences in interpretation of the judicial estoppel doctrine among the Circuits are so great that the Circuits are not so much split as they are splintered. The Tenth Circuit and the D.C. Circuit Courts of Appeals reject the doctrine of judicial estoppel outright because it precludes the search for truth,

which is the goal of the modern Federal Rules of Civil Procedure.[3] *See Parkinson v. California Company*, 233 F.2d 432 (10th Cir. 1956); *Chrysler Credit Corp. v. County Chrysler, Inc.*, 928 F.2d 1509, 1522 (10th Cir. 1991)[4]; *Konstantinidis v. Chen*, 626 F.2d 933 (D.C.Cir. 1980); *United Mine Workers of America 1974 Pension v. Pittston Co.*, 984 F.2d 469, 477 (D.C.Cir. 1993), *cert. denied*, 509 U.S. 924 (1993).

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[3] "Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the *sine qua non* of a fair trial." *Estes v. Texas*, 381 U.S. 532, 540 (1965). Our legal system exalts "the search for truth in the administration of justice." *Nix v. Williams*, 467 U.S. 431, 445, 447-450 (1984). Estoppel in general can "blockade[] unexplored paths that may lead to the truth." *Brown v. Felsen*, 442 U.S. 127, 132 (1979).

That judicial estoppel violates standards of fairness and due process because it suppresses the truth has been noted by the courts and commentators. The Court of Appeals for the Sixth Circuit has said that

> [j]udicial estoppel is applied with caution to avoid impinging on the truth-seeking function of the court because the doctrine precludes a contradictory position without examining the truth of either statement.

Teledyne Industries, Inc. v. N.L.R.B., 911 F.2d 1214, 1218 (6th Cir. 1990). *See also* Douglas W. Henkin, *Judicial Estoppel--Beating Shields into Swords and Back Again*, 139 U.Pa.L.Rev. 1711 (1991)(judicial estoppel should be eliminated because it violates truth-seeking function of courts and liberal pleading policies of Federal Rules).

[4] A District Court within the Tenth Circuit, in a case involving the ADA claims of an AIDS victim who had filed for disability benefits attesting that he was unable to work, rejected the employer-defendant's judicial estoppel argument, based upon the rejection of judicial estoppel in the circuit, and denied summary judgment. *EEOC v. MTS Corp.*, No. CIV 94-1473 LH/WWD, 1996 WL 449919, at *6 (D.N.M. July 26, 1996).

C. The Requirement of Prior Success Divides the Circuits

Application of judicial estoppel also divides the Third Circuit from all the other Courts of Appeals that have examined the issue of prior success. The Third Circuit has held that judicial estoppel may be applied regardless of the success obtained by the plaintiff in the prior proceeding. Thus, it does not matter that he did not convince a fact-finder in a prior proceeding to accept his position; the mere attempt to convince is sufficient. *Ryan Operations GP v. Santiam-Midwest Lumber Co.*, 81 F.3d 355 (3d Cir. 1996).[5] The Court in *Ryan* noted that the Third Circuit is in disagreement with the 6th and 7th Circuit Courts of Appeals on the issue of "success". *Ryan*, 81 F.3d at 361 n. 3. In fact, of the Circuits that have decided the issue, the Third Circuit appears to be the only Circuit Court of Appeals to hold that success is unnecessary.[6]

D. The Definition of "Judicial Proceeding," the Effect of Settlement in the Prior Proceeding and the Need for Reliance or Prejudice All Divide the Circuits.

There is further division among the Circuits as to whether the prior success need have been in a court of law or at least in a quasi-judicial proceeding. The Third Circuit takes the position

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[5] *McNemar v. The Disney Stores, Inc.*, 91 F.3d 610 (3d Cir. 1996) was the first decision by the Third Circuit Court of Appeals utilizing the criteria first set forth in *Ryan*.

[6] *See Bates v. Long Island R. Co.*, 997 F.2d 1028 (2d Cir. 1993), *cert. denied*, 510 U.S. 992 (1993); *Lowery v. Stovall*, 92 F.3d 219, 224 (4th Cir. 1996); *U.S. for Use of American Bank v. CIT Const. Inc. Of Texas*, 944 F.2d 253 (5th Cir. 1991); *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595 (6th Cir. 1982); *Astor Chauffeured Limousine v. Runnfeldt Investment Corp.*, 910 F.2d 1540 (7th Cir. 1990)(all agreeing prior success necessary for application of judicial estoppel).

that merely filing for benefits is sufficient to trigger the application of judicial estoppel. The Ninth Circuit Court of Appeals agrees. *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.2d 597, 604 (9th Cir. 1996).

The Sixth Circuit Court of Appeals, to the contrary, does not allow the application of judicial estoppel where the prior assertion was made in an uncontested, non-judicial administrative proceeding. *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595 (6th Cir. 1982).

The Eleventh Circuit Court of Appeals has not ruled on the issue, but the District Court for the Southern District of Florida, examining Eleventh Circuit and Fifth Circuit precedent, has held in an ADA case involving an AIDS patient that judicial estoppel is inapplicable to administrative filings taken under oath. *Dockery v. North Shore Medical Center*, 909 F.Supp. 1550 (S.D.Fla. 1995). [7]

Judicial estoppel has given rise to yet another division in the Circuits over the issue of whether settlement in the prior proceeding constitutes "success" and allows for the application of judicial estoppel. *See Rissetto*, 94 F.3d 597, 604-605, 605

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[7] Commentators have followed the view that the prior proceeding must have been judicial in nature. *See* Note, *The Doctrine of Preclusion Against Inconsistent Positions in Judicial Proceedings*, 59 Harv.L.Rev. 1132, 1132 n. 6 (1946); Mark J. Plumer, *Judicial Estoppel: The Refurbishing of a Judicial Shield*, 55 Geo.Wash.L.Rev. 409, 411 n. 11 (1987)("Given that the underlying policy objective of judicial estoppel is to preserve the integrity of the judicial process...the doctrine should be applied only when statements giving rise to the inconsistency are made in courts of law.")

n.6 (9th Cir. 1996)("We hold that a favorable settlement constitutes the success required[.]," noting the contrary view of the Sixth Circuit Court of Appeals in *Edwards*, 690 F.2d at 599); *See also Konstantinidis v. Chen*, 626 F.2d 933, 939 (D.C.Cir. 1980)(settlement does not provide the prior approval of a court that judicial estoppel requires). And in a further splintering of the Circuit Court decisions, some of the Courts of Appeals have stated that judicial estoppel requires reliance and detriment (or prejudice) to the opposing party. *See Young v. U.S. Dept. Of Justice*, 882 F.2d 633, 639-640 (2d Cir. 1989); *Jackson Jordan, Inc. v. Plasser American Corp.*, 747 F.2d 1567, 1578-80 (Fed. Cir. 1984); *Maitland v. University of Minnesota*, 43 F.3d 357, 363-364 (8th Cir. 1994).

E. The Splintering of the Circuits Provides Insufficient Guidance to Comport with Due Process and Calls for This Court's Supervision.

As can be seen by the splintered interpretation and unpredictable application of the doctrine of judicial estoppel among the Circuits, Petitioner McNemar and the legion of others in a similar position will be accorded trial or barred from trial on their ADA claims based, unacceptably, on an accident of geography or the whim of a judge who wishes to act with unguided discretion behind the mask of judicial estoppel against a litigant who may *appear* to be lying (or appears to have lied previously). Indeed, the unhappy fact is that any judge who uses judicial estoppel must make fact and credibility determinations in violation of Fed.R.Civ.P. 56 and the requirements set forth by this Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)("It is not the role of the judge at the summary judgment stage to weigh the evidence or to evaluate credibility[.]").

The doctrine of judicial estoppel has been described as "rather vague[8]," an "obscure doctrine[9]," "lacking defined principles," "rather amorphous," and as leading to "an *ad hoc* decision in each case.[10]" Judicial estoppel was created to address the inconsistency of litigants' statements in cases where collateral estoppel and equitable estoppel would not apply. That problem is now addressed by the modern Federal Rules of Civil Procedure in Rule 11 and elsewhere. Because of the vagueness of the doctrine of judicial estoppel and its allowance of unguided discretion in violation of summary judgement standards, it is respectfully suggested that there is a need and an opportunity for this Court to use its supervisory powers to delineate a uniform judicial estoppel rule or to bar the use of this unnecessary and unfair doctrine completely.

II. THE USE OF JUDICIAL ESTOPPEL VIOLATES THE SEVENTH AMENDMENT RIGHT TO TRIAL.

A. Use of Judicial Estoppel Violates the Intent of Congress That Trial On Issues of Discrimination Not Be Denied.

The search for truth is to be especially guarded when it has the sanction of broad and beneficial public policy, as with the framework of laws to fight discrimination in the workplace. This Court has always sought to guard the intent of Congress that the

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[8] *Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208, 212 (1st Cir. 1987).

[9] *U.S. v. Kattar*, 840 F.2d 118, 129 n.7 (1st Cir. 1988).

[10] *Nichols v. Scott*, 69 F.3d 1255, 1272 (5th Cir. 1995).

search for the truth of discrimination charges not be impaired unnecessarily by common law rules of preclusion. This Court has protected a Title VII complainant's right to trial from preclusion by unreviewed state administrative proceedings. *University of Tennessee v. Elliott*, 478 U.S. 788 (1986). *See also Astoria Federal S. & L. Ass'n. v. Solimino*, 501 U.S. 104 (1991)(Age complainant). The election of remedies doctrine was barred from vitiating a Title VII complainant's right to trial because of prior arbitration of his claims under a collective bargaining agreement. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49-51 (1974).

The Court has previously upheld the principle that where trials are necessary to vindicate important public policies set into law by Congress, they should not be precluded by policies of less import. *Perma Life Mufflers, Inc. v. Intern. Parts Corp.*, 392 U.S. 134, 136 (1968) (Court of Appeals' application of the doctrine of *in pari delicto* reversed because such application "threaten[s] the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States."); *Brown v. Felsen*, 442 U.S. 127 (1979)(res judicata held not to bar action where its application would be inconsistent with the policies underlying the Bankruptcy Act).

Most recently, in the *McKennon* decision, this Court refused to recognize the equitable doctrine of "unclean hands"[11] as a valid reason to deny an age discrimination complainant trial because of evidence of wrongdoing on her part, discovered after

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[11] In essence, Petitioner McNemar was being sanctioned by the courts below for his (perceived) wrongful behavior, *i.e.*, "lying" to receive disability benefits.

she had filed claims under the Age Discrimination in Employment Act. *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. ___, ____, 115 S.Ct. 879, 885 (1995).

This Court in *McKennon* did not allow the preclusion of trial because of the broad and important public policies encompassed in the statutory scheme to protect employees in the workplace nationwide.[12] That framework includes the Americans With Disabilities Act. *McKennon*, 115 S.Ct. at 884. The ADA shares all the important purposes of the other Congressional enactments that constitute the broad antidiscrimination policies of this nation. Petitioner McNemar is entitled to trial on his claims and should not be barred from trial by the doctrine of judicial estoppel.

B. Use Of Judicial Estoppel Violates the Intent of the Founders That Denial of Trial Have Some Mooring in the Common Law As They Knew It

The denial of trial based upon the doctrine of judicial estoppel is also constitutionally infirm on a completely different ground. Allowing use of this common law preclusion doctrine would violate the intent of the Seventh Amendment that the right to trial not be at great variance with the right as it stood in

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[12] "The objectives of the ADEA are furthered when even a single employee establishes that an employer has discriminated against him or her. The disclosure through litigation of incidents or practices which violate national policies respecting nondiscrimination in the workforce is itself important, for the occurrence of violations may disclose patterns of noncompliance resulting from a misappreciation of the Act's operation or entrenched resistance to its commands, either of which can be of industry-wide significance." *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. ____, ____, 115 S.Ct. 879, 885 (1995).

the common law at the time of the ratification of the Amendment in 1791. Variance has been allowed by this Court. *See, e.g., Parklane Hosiery Co., Inc. v. Shore,* 439 U.S. 322 (1979)(allowance of offensive collateral estoppel, not recognized in 1791). However, this is an instance where the doctrine itself did not exist under the common law until 1857, nearly seventy years and some three generations of Americans after the ratification of the Seventh Amendment.[13] It is in no sense a traditional preclusion doctrine rooted in the common law of the sort to which the courts should defer. To allow such a doctrine to deny trial would be to abandon completely the anchor the Founders provided to the Seventh Amendment in the common law as they knew it. *See Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 337-356 (1979)(Rehnquist, J. dissent).

III. THE PROBLEMS ADDRESSED BY JUDICIAL ESTOPPEL CAN BE REMEDIED BY OTHER MEANS WITH LESS HARM TO DUE PROCESS AND TRIAL RIGHTS.

The rights of the employer in ADA cases cannot be disregarded. But fairness to the employer is far more fairly dealt with by allowing Disney at trial to cross-examine and impeach Petitioner McNemar by using his prior sworn applications for benefits than by denying trial to him. Judicial estoppel should be abandoned and the other remedies available should be used in its place. Courts and commentators have stated:

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[13] The first case to use the doctrine was *Hamilton v. Zimmerman*, 37 Tenn. (5 Sneed) 39 (1857). *See* Rand G. Boyers, *Comment-Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 Nw.L.Rev. 1244, 1245 (1986).

> Even in the case of false statements in pleadings, public policy can be vindicated otherwise--and more practically and fairly in most instances--than through suppression of truth in the future...The inconsistent statements may be evidentiary as admissions--convincing, persuasive or of little weight, according to the particular circumstances--but in and of themselves, they will not conclude a party as a matter of law.

Parkinson v. California Company, 233 F.2d 432, 438 (10th Cir. 1956); *See alsoTeledyne Industries, Inc. v. N.L.R.B.*, 911 F.2d 1214, 1218 (6th Cir. 1990)(noting reliance on Fed.R.Evid. 801(d)(1)(A) and Fed.R.Evid. 613); *Dockery v. North Shore Medical Center*, 909 F.Supp. 1550, 1559 (S.D.Fla. 1995)(prior sworn statements in disability applications only "one more piece of evidence" in ADA case); Note, *The Doctrine of Preclusion Against Inconsistent Positions In Judicial Proceedings*, 59 Harv. L.Rev. 1132, 1136 n.36 (1946)("Using a prior inconsistent statement as an admission is less drastic than precluding a change of position, because the jury is not foreclosed from weighing the earlier position against the later one and deciding which represents objective truth."); *Comment-Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 Nw.L.Rev. 1244, 1255 (1987) (impeachment better than "extreme measure of judicial estoppel"); Douglas W. Henkin, *Judicial Estoppel--Beating Shields into Swords and Back Again*, 139 U.Pa.L.Rev. 1711, 1717 (1991)(should "create a 'bursting bubble' presumption as to the truth of prior assertions. This presumption, along with the appropriate use of sanctions against both attorneys and litigants, would accomplish

all that judicial estoppel arguably does and more, with few, if any, of the harsh results.").

When used as it was against Leonard McNemar, judicial estoppel effectively acts to take away a litigant's right to trial as a punishment for appearing to lie.[14] In the years before the adoption of the modern Federal Rules, this was perhaps a necessary remedy to the problem of litigant inconsistency. However, in line with the modern Rules, such problems are dealt with without violating a litigant's rights, by application of Fed.R.Civ.P 11(which can be used against both litigants and attorneys), by use of Fed.R.Civ.P. 60(b) to reopen a judgment found to be inconsistent with another, by use of Federal Rules of Evidence 801(d)(2) and 613(a) to impeach a litigant's prior statements, by use of the perjury statutes and by use of the courts' inherent powers. Summary judgment (not based on judicial estoppel) remains available if there is no reasonable evidence of a litigant's ability to work with or without reasonable accommodation.[15]

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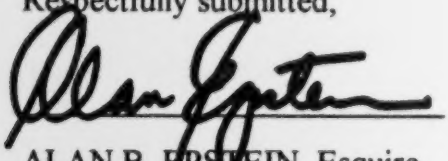
[14] As one District Court has stated, "It is not the province of the courts in cases like these to enforce perjury or fraud penalties by excluding a plaintiff from formulating her case as she sees fit within the bounds of allowable procedure." *Dockery v. North Shore Medical Center*, 909 F.Supp. 1550, 1559 n. 16 (S.D.Fla. 1995).

[15] For further reasons to abandon the doctrine of judicial estoppel, see Anne Beaumont, *This Estoppel Has Got To Stop: Judicial Estoppel And The Americans With Disabilities Act*. (Unpublished Manuscript, forthcoming N.Y.U.L.Rev. (1996))(differing definitions of "disability" between Social Security, *et al.*, and ADA).

CONCLUSION

This Court should use its supervisory powers to eliminate the noxious and unfair doctrine of judicial estoppel before a generation of disabled workers is silenced by its use. Petitioner asks that this Court grant *certiorari* in this case.[16]

Respectfully submitted,



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[16] In light of cases now before other Circuit Courts dealing with the issue of judicial estoppel in similar circumstances, *e.g.*, *Harris v. Marathon Oil*, No. 96-50202 (5th Cir. August 29, 1996), Petitioner respectfully suggests that this Court may want to hold Petitioner's case without action, awaiting further evaluation of these issues in the other Circuit Courts of Appeal.

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91 F.3d 610, McNemar v. Disney Store, Inc., (C.A.3 (Pa.) 1996)

*610 65 USLW 2139, 5 A.D. Cases 1227, 8 NDLR P 250

Leonard C. McNEMAR, Appellant,
v.
The DISNEY STORE, INC., Appellee.

No. 95-1590.
United States Court of Appeals,
Third Circuit.
Argued June 11, 1996.
Decided July 31, 1996.

HIV-positive former employee brought action against his former employer following his discharge, asserting discrimination claims under the Americans with Disabilities Act (ADA), the New Jersey Law Against Discrimination (NJLAD) and the Employee Retirement Income Security Act (ERISA) as well as state law claims for invasion of privacy and intentional infliction of emotional distress. The United States District Court for the Eastern District of Pennsylvania, Clarence C. Newcomer, J., 1995 WL 390051, granted summary judgment in favor of former employer. Former employee appealed. The Court of Appeals, Aldisert, Circuit Judge, held that: (1) sworn

statements by former employee in applications for disability benefits and for exemption from repayment of educational loan that he was totally disabled judicially estopped former employee from contending that he was "qualified individual with disability;" (2) former employee's allegations were insufficient to state claim for invasion of privacy; and (3) former employer's discharge of former employee did not constitute extreme or outrageous conduct necessary for intentional infliction of emotional distress claim.

Affirmed.

[WEST Keynotes Omitted]

***612** Alan B. Epstein (argued), Jablon Epstein Wolf & Drucker, Philadelphia, PA, for Leonard C. McNemar.

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Vicki Laden, Legal Aid Society of San Francisco, San Francisco, CA, for amicus curiae, The Employment Law Center, The Lambda Legal Defense and Education Fund, The Aids Law Project of Pennsylvania, and The Disability Rights Education and Defense Fund, Inc.

Stephen M. Koslow, American Association of Retired Persons, Washington, DC, for amicus curiae, The American Association of Retired Persons.

Richard M. Schall, Tomar, Simonoff, Adourian, O'Brien,

Kaplan, Jacoby & Graziano, Haddonfield, NJ, for amicus curiae New Jersey Employment Lawyers' Association.

Robert J. Gregory (argued), Washington, DC, for amicus curiae Equal Employment Opportunity Commission.

Michael J. Ossip, Morgan, Lewis & Bockius, Philadelphia, PA, for amicus curiae The Chamber of Commerce of the United States of America.

Ann E. Reesman, McGuiness & Williams, Washington, DC, for amicus curiae The Equal Employment Advisory Council.

Before: STAPLETON, GREENBERG and ALDISERT, Circuit Judges.

OPINION OF THE COURT

ALDISERT, Circuit Judge.

Under the particular facts presented here we must decide whether the teachings of Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355 (3d Cir.1996), may be applied in this case to invoke the doctrine of judicial estoppel. Specifically, we must decide whether Appellant is judicially estopped from contending that he is a " 'qualified ***613** person with a disability' ... who, with or without reasonable accommodation, can perform the essential functions" of a job as contemplated by the Americans With Disabilities Act, 42 U.S.C. Secs. 12111(8), 12112(a), in light of his representations to federal and state government agencies that he is totally disabled and unable to work.

This issue is presented in Leonard McNemar's appeal from the district court's order granting The Disney Store's motion for summary judgment on McNemar's discrimination claims under the Americans With Disabilities Act (ADA), the New Jersey Law Against Discrimination (NJLAD), and Sec. 510 of the Employee Retirement Income Security Act (ERISA). McNemar appeals also from the district court's order granting Disney summary judgment on his New Jersey state law claims for invasion of privacy and intentional infliction of emotional distress.

In granting summary judgment, the district court held that McNemar was judicially estopped from asserting his claims under the ADA, NJLAD, and ERISA because of his prior sworn statements, made in his application for Social Security Disability Insurance benefits and New Jersey state disability benefits, that he was unable to work because of a disabling physical condition. The district court further held that McNemar had failed to satisfy prima facie requirements of his state law claims of invasion of privacy and intentional infliction of emotional distress.

The district court had jurisdiction over Appellant's ADA and ERISA claims pursuant to 28 U.S.C. Sec. 1331. The district court had supplemental jurisdiction over Appellant's state law claims pursuant to 28 U.S.C. Sec. 1367. This court has jurisdiction pursuant to 28 U.S.C. Sec. 1291. The appeal was timely filed under Rule 4(a), Federal Rules of Appellate Procedure.

[1] [2] This court reviews the district court's application of judicial estoppel for abuse of discretion. Yanez v. United

States, 989 F.2d 323 (9th Cir.1993); Levin v. Robinson, Wayne & La Sala, 246 N.J.Super. 167, 586 A.2d 1348, 1357 (Law Div.1990) (citing Matter of Cassidy, 892 F.2d 637, 642 (7th Cir.1990)). This court has plenary review of the district court's order granting summary judgment on the state law claims. Kinney v. Yerusalim, 9 F.3d 1067, 1070 (3d Cir.1993), cert. denied, --- U.S. ----, 114 S.Ct. 1545, 128 L.Ed.2d 196 (1994).

Because application of the doctrine of judicial estoppel always is factually driven, we now will set forth the facts in extensive narrative detail.

I.

McNemar was employed by The Disney Store, Inc. as an assistant store manager in Cherry Hill, New Jersey. On October 12, 1993, McNemar was hospitalized for pneumocystis carinii pneumonia and diagnosed as HIV-positive. Between becoming ill in October 1993 and being terminated at Disney on November 18, 1993, McNemar would miss 17 1/2 of 25 work days (68% of his normal working time).

McNemar revealed the results of his diagnosis to Lillian Forcey, the store manager, whom he considered to be his friend. He did not tell anyone else at the store, but he did tell other friends, including two people he had worked with at a Disney store in Delaware before his transfer to Cherry Hill in 1992.

On November 8, 1993, Joelyn Ale, the Disney Store District Manager, summoned McNemar to her office, privately informed him that she had heard rumors that he had tested positive for HIV, and asked if the rumors were true. Ale

explained that she was informing McNemar of the rumors so that, should he want to, he could address them. McNemar admits that Ale was being supportive, offering to help him in any way possible. However, he told Ale that he was not in fact HIV-positive, but that he had pneumonia. McNemar thanked Ale for informing him of the rumors, declined any assistance, and said he thought he knew the source and would deal with the problem himself.

On November 16, 1993, in knowing violation of company policy, McNemar took two dollars from the store cash register and asked another employee, Estelle Williamson, to use the money to purchase cigarettes for *614 him. Because Disney policy requires that all employees store their personal belongings in lockers in the back of the store, McNemar had no cash on his person. Rather than go to his locker to retrieve money from his wallet, McNemar took the two dollars from the cash register and gave it to Williamson to purchase the cigarettes. McNemar then discarded the cash register transaction record, which, according to company policy, must be signed and filed whenever money from the cash register is used.

Williamson purchased the cigarettes and then called Disney's Loss Prevention Hotline to report that McNemar had taken money from the register, in violation of Disney's anti-shrinkage policy. After Williamson returned with the cigarettes, McNemar took a smoke break in the back of the store, but failed to retrieve his own money in order to reimburse the cash register.

McNemar had sole responsibility for closing the store that night, a procedure that included balancing cash deposits with

receipts. In performing this task, McNemar still did not replace the cash in the register or put it with the cash deposits for the day; he simply sealed the cash deposit bags without replacing any money. Even though the daily balance was discrepant by the two dollars he had taken, McNemar made no notation or report of what had occurred.

Meanwhile, Williamson had reported McNemar's initial infraction to another assistant manager, Maria Skyrm Brookover. Brookover checked the register, found that it was two dollars short, and looked unsuccessfully for a transaction record in the accordion file where it should have been placed. Brookover instructed Williamson to call Disney's "Loss Prevention Hotline"; Brookover also called the hotline herself.

The next morning, November 17, 1996, Evelyn McCorristin, the assistant manager who opened the store, followed standard store procedures in checking the previous day's cash deposits, register amounts, and the safe fund. McCorristin discovered that the cash deposits were off by two dollars, and noted the discrepancy. She then counted the register and safe fund amounts, which were as they should have been, not containing any extra money. A short time later, Brookover, who was not working that morning, called McCorristin to ask whether there was still a dollar shortage; McCorristin told her that there was. Brookover then told Ale about what had happened the previous day, confirming that the money was still missing.

The Disney Store management then began the investigation procedure it uniformly follows when an employee is reported for the unauthorized taking of company money or property for

personal use. On November 18, 1996, McNemar's next day of work, he was interviewed by Ale, in person, and by Jeff Hill, a Disney Store Loss Prevention Supervisor in Atlanta, by telephone. During the interview, McNemar admitted to taking the money for his personal use, after which, at Hill's request, McNemar wrote and signed a statement recounting his actions in the matter.

On the basis of this admission, Ale and Hill then immediately suspended McNemar, asked him for his store keys and identification, and told him that they would speak to Disney headquarters in California about whether he should be discharged. At this point McNemar broke down in tears and apologized for taking the money, then divulged that he was HIV-positive.

Ale reported the substance of the interview to Teri Meiers, Employee Relations Supervisor at California Headquarters. Upon hearing that McNemar had at the last minute revealed that he was HIV-positive, Meiers thought it prudent to check with her superiors before approving a discharge. She consulted with Michael Frank, Vice President for Human Resources, who felt the situation was clear-cut and required a discharge, and with Curt Carlile, then Manager of Training and Employee Relations, who concurred. Both Frank and Carlile felt that McNemar should not be penalized less severely than other employees in similar situations simply because of his disclosure. (FN1)

***615** Later that same day, Ale telephoned McNemar and asked him to come in for another meeting to discuss the decision to terminate his employment. When McNemar refused to come in, Ale told him of the decision to discharge him.

II.

Following his dismissal, McNemar applied for and received New Jersey state disability benefits, Social Security disability benefits, and exemption from repayment of an educational loan from the Pennsylvania Higher Education Agency. To obtain these benefits, McNemar and his doctors have certified under penalty of perjury that he has been totally and permanently disabled and unable to work since October 1, 1993, at least five weeks before he was discharged by Disney.

For example, in his November 23, 1993, application for Social Security Disability Insurance (SSDI) benefits, McNemar made a sworn statement that he "became unable to work because of my disabling condition on October 01, 1993." (FN2) On the same date, McNemar applied for Supplemental Social Security Income (SSI), and on that application he stated that he was disabled and was informed that making false statements would subject him to civil and criminal penalties. (FN3)

On December 2, 1993, McNemar applied for New Jersey State disability benefits, certifying that his disability was "AIDS" and that he had been afflicted since October 12, 1993. (FN4) On January 11, 1994, McNemar certified ***616** to the New Jersey State Disability Insurance Service that he had been "unable to perform the duties of [his] regular occupation" since October 12, 1993. (FN5)

On his December 2, 1993 application for state disability benefits, McNemar submitted a statement, signed by Dr. Roseann Lorenick, his physician at the time, that McNemar had been disabled and unable to work because of a disability from

"10/93 to present." JA 166. On January 20, 1994, Dr. Lorenick certified that McNemar had been under her care for the "period of disability" from "10/14/93 through present" and that "[t]he patient has been unable to perform all the duties of his/her regular or usual job (i.e., too disabled to work) from 10/16/93." JA 169. And on June 15, 1994, Dr. John Turner, a specialist whom McNemar began seeing in February 1994, certified that "[a]s of October 13, 1993 Mr. McNemar has been totally and permanently disabled." JA 179.

On July 19, 1994, McNemar applied to the Pennsylvania Higher Education Agency for a deferment from making payments on his loan principal, on the basis that he was "unable to work and earn money." JA 178. On July 27, 1994, when completing his portion of McNemar's loan deferment application, Dr. Turner faced a choice of certifying that McNemar had (1) a temporary disability or (2) a total and permanent disability. Dr. Turner chose the latter, signing the following statement:

> I certify that in my best professional judgment [McNemar is] ... [p]ermanently totally disabled and so is unable to work and earn money because of an impairment that is expected to continue indefinitely or result in death.
>
> JA 178.

III.

On November 17, 1994, McNemar filed a complaint against Disney which alleged unlawful discrimination in violation of the ADA and ERISA and which, relying on supplemental

jurisdiction, contained several state law claims. (FN6) On May 8, 1995, Disney moved for summary judgment on all of McNemar's claims. On June 16, 1995, McNemar filed his brief in opposition and formally withdrew, with prejudice, half of his claims because they provided redundant bases of recovery. (FN7) On June 30, 1995, the district court granted Disney's motion and entered judgment in Disney's favor on all of McNemar's remaining claims, holding that McNemar was judicially estopped from asserting his claims under the ADA, NJLAD and ERISA because of his prior sworn statements to various government agencies that he was totally and permanently disabled and unable to work. The district court held also that McNemar had failed as a matter of law to satisfy prima facie requirements of his state law claims for invasion of privacy and intentional infliction of emotional distress. This appeal followed.

IV.

[3] The doctrine of judicial estoppel serves a consistently clear and undisputed jurisprudential purpose: to protect the integrity of the courts. The Court of Appeals for the Ninth Circuit recently described this as the basis on which a court has the discretion to exercise judicial estoppel: "[T]he purpose *617 of the doctrine is to protect the integrity of the judicial process. Accordingly, the doctrine of judicial estoppel 'is an equitable doctrine invoked by a court at its discretion.' " Yanez v. U.S., 989 F.2d 323, 326 (9th Cir.1993) (quoting Morris v. California, 966 F.2d 448, 452-53 (9th Cir.1991), cert. denied, 506 U.S. 831, 113 S.Ct. 96, 121 L.Ed.2d 57, (citation omitted) (1992)).

This court has accepted the doctrine of judicial estoppel at least since Scarano v. Central Railroad Co. of New Jersey, 203 F.2d 510, 513 (3d Cir.1953), and consistently has reiterated the judicial system integrity purpose of the doctrine. See, e.g., Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 361 (3d Cir.1996) ("[j]udicial estoppel is intended to prevent parties from playing fast and loose with the courts by asserting inconsistent positions"); EF Operating Corp. v. American Buildings, 993 F.2d 1046, 1050 (3d Cir.), cert. denied, 510 U.S. 868, 114 S.Ct. 193, 126 L.Ed.2d 151 (1993) ("It goes without saying that one cannot casually cast aside representations, oral or written, in the course of litigation simply because it is convenient to do so"); Fleck v. KDI Sylvan Pools, Inc., 981 F.2d 107, 121 (3d Cir.1992), cert. denied, 507 U.S. 1005, 113 S.Ct. 1645, 123 L.Ed.2d 267 (1993) (judicial estoppel "preserves the integrity of the judicial system" by preventing parties from "assert[ing] a position in this proceeding inconsistent with the one they previously asserted"); Delgrosso v. Spang & Co., 903 F.2d 234, 241 (3d Cir.), cert. denied, 498 U.S. 967, 111 S.Ct. 428, 112 L.Ed.2d 412 (1990) (judicial estoppel "precludes a party from assuming a position in a legal proceeding that contradicts or is inconsistent with a previously asserted position"); Gleason v. United States, 458 F.2d 171, 175 (3d Cir.1972) (judicial estoppel is "applied to secure substantial equity").

[4] McNemar argues that the use of judicial estoppel is subject to narrow requirements that preclude its use here:

> Thus, in this Circuit, a litigant seeking to judicially estop his opponent from asserting a contrary position must show that: (1) his opponent had asserted an inconsistent position

> under oath in a prior judicial proceeding; (2) the prior statement was accepted by a judicial tribunal; (3) he was a litigant to the first judicial proceeding; and (4) he would be prejudiced unless the opponent is estopped.

Appellant's Br. at 22 (relying on, inter alia, Scarano). We disagree. The Scarano court was careful to warn that in applying judicial estoppel, " 'each case must be decided upon its own particular facts and circumstances.' " Scarano, 203 F.2d at 513 (quoting Galt v. Phoenix Indemnity Co., 120 F.2d 723, 726 (App.D.C.1941)). Moreover, in Ryan Operations this court recently emphasized that the application of judicial estoppel is not limited in the formulaic manner urged by Appellant:

> There are many instances in which the assertion of inconsistent positions can work to the advantage of a party ... where there is no identity or relationship between those against whom the claim (or defense) is asserted. Where the contentions are mutually exclusive, it is irrelevant that they are asserted against diverse parties for the purposes of determining judicial estoppel. The integrity of the court is affronted by the inconsistency notwithstanding the lack of identity of those against whom it is asserted.

Ryan Operations, 81 F.3d at 360. Thus the doctrine of this court on judicial estoppel remains rooted in the twin concepts that have characterized our jurisprudence from our early pronouncements in Scarano in 1953 to the current refinements expressed this year in Ryan Operations: judicial estoppel is an equitable doctrine, invoked by a court in its discretion (1) to preserve the integrity of the judicial system by preventing parties from playing fast and loose with the courts in assuming

inconsistent positions, and (2) with a recognition that each case must be decided upon its own particular facts and circumstances.

[5] In light of this clearly established rationale, the district court was well within its discretion to hold that McNemar "is estopped from arguing now that he is 'qualified' under the ADA and NJLAD." Dist. Ct. Op. at 8-9. Indeed, the jurisprudence of this court on judicial estoppel would seem to speak directly to McNemar's situation: "[t]o ***618** permit a party to assume a position inconsistent with a position it had successfully relied upon in a past proceeding 'would flagrantly exemplify ... playing "fast and loose with the courts" which has been emphasized as an evil the courts should not tolerate.' " Delgrosso, 903 F.2d at 241 (quoting Scarano, 203 F.2d at 513).

We are satisfied that the district court's application of judicial estoppel qualifies under the two-part threshold inquiry articulated in Ryan Operations: (1) Is the party's present position inconsistent with a position formerly asserted? (2) If so, did the party assert either or both of the inconsistent positions in bad faith--i.e., "with intent to play fast and loose" with the court? Ryan Operations, 81 F.3d at 361.

Clearly McNemar has asserted inconsistent positions regarding his ability to work. Before the Social Security Administration he and his physicians have certified under penalty of perjury that he was totally and permanently disabled. He made similar representations when he applied for New Jersey state disability benefits. And when applying for an exemption from making payments on his student loans, he represented to the state of Pennsylvania that he was unable to work and earn

money. Thus, McNemar has represented to one federal agency and to the agencies of two different states that he was totally disabled and unable to work--while now, in claiming relief under the American Disabilities Act, he states that he is "a qualified person with a disability who, with or without reasonable accommodation, can perform the essential functions of a job" as contemplated by 42 U.S.C. Secs. 12111(8), 12112(a).

Moreover, well reasoned decisions have judicially estopped plaintiffs in situations similar to this one from "speak[ing] out of both sides of [their] mouth with equal vigor and credibility before [the] court." Reigel v. Kaiser Foundation Health Plan of N.C., 859 F.Supp. 963, 970 (E.D.N.C.1994). See, e.g., August v. Offices Unlimited, Inc., 981 F.2d 576, 582-84 (1st Cir.1992); Garcia-Paz v. Swift Textiles, 873 F.Supp. 547, 554 (D.Kan.1995); Kennedy v. Applause, Inc., 1994 WL 740765 at *3-*4 (C.D.Cal. Dec. 6, 1994). McNemar's statements on his disability benefits application are "unconditional assertions as to his disability"; he should not now be permitted to "qualify those statements where the application itself is unequivocal." Smith v. Midland Brake, Inc. 911 F.Supp. 1351, 1361 (D.Kan.1995) (citing Scarano, 203 F.2d at 513).

V.

[6] McNemar alleges that in terminating his employment, Disney violated the Americans With Disabilities Act and the New Jersey Law Against Discrimination. Because the New Jersey statute relies on the same analytical framework as does the federal act, the district court addressed these claims together. Dist. Ct. Op. at 6-7 (citing Shaner v. Horizon Bancorp., 116 N.J. 433, 561 A.2d 1130, 1132 (1989)). To

qualify for protection against discrimination under Title I of the ADA, a plaintiff must prove that he or she is a "qualified person with a disability who, with or without reasonable accommodation, can perform the essential functions of the job." 42 U.S.C. Secs. 12111(8), 12112(a). Accordingly, a person unable to work is not intended to be, and is not, covered by the ADA. See 42 U.S.C. Secs. 423(d); see also H.R.Rep. No. 101-485(II), 101st Cong.2d. Sess. 71 (1990), reprinted in 1990 U.S.C.C.A.N. 353; H.R.Rep. No. 101-485(III), 101st Cong.2d. Sess. 35-36 (1990), reprinted in 1990 U.S.C.C.A.N. 458. The New Jersey statute contains a similar requirement, prohibiting discrimination against handicapped persons "unless the nature and extent of the handicap reasonably precludes the performance of the particular employment." N.J.S.A. Sec. 10:5-4.1. Thus to be covered by these statutes, McNemar had to prove that at all material times he was able to perform the essential functions of his job, with or without accommodation. See McDonald v. Commonwealth of Pennsylvania, 62 F.3d 92, 96 (3d Cir.1995).

In arriving at its decision, the district court observed that "most federal courts agree that an employee who represents on a benefits application that he is disabled is judicially estopped from arguing that he is qualified to perform the duties of the position involved." ***619** Dist. Ct. Op. at 9; see, e.g., August v. Offices Unlimited, Inc., 981 F.2d 576, 582-84 (1st Cir.1992) (plaintiff who certified on form for disability benefits that he was "totally disabled" was precluded as a matter of law from arguing that he was a "qualified handicapped person" under Massachusetts law); Garcia-Paz v. Swift Textiles, 873 F.Supp. 547, 554 (D.Kan.1995) (plaintiff with multiple sclerosis who certified on long-term disability benefits application that she was

"unable to perform material duties of work" was estopped from arguing that she was qualified individual under ADA); Kennedy v. Applause, Inc., 1994 WL 740765 at *3-*4 (C.D.Cal. Dec. 6, 1994) (plaintiff with chronic fatigue syndrome who represented for purposes of obtaining disability benefits that she was completely disabled was estopped from arguing that she was qualified under ADA); Reigel, 859 F.Supp. at 967-70 (plaintiff with shoulder injury who claimed for purposes of receiving disability insurance payments that she was prematurely disabled was estopped from arguing that she was qualified under ADA). (FN8)

Thus even though this court has not previously applied judicial estoppel to facts similar to those before us here, other federal courts have addressed analogous factual situations, and many have judicially estopped the plaintiffs in those situations from "speak[ing] out of both sides of [their] mouth with equal vigor and credibility before [the] court." Reigel, 859 F.Supp. at 970. That precedential basis, and this court's teachings on judicial estoppel, clearly support the discretion of the district court to estop a party from asserting contradictory positions.

[7] In adjudicating cases brought under the ADA and NJLAD, courts apply the burden-shifting framework applicable to cases brought under Title VII of the Civil Rights Act of 1964. See 42 U.S.C. Sec. 12117; Zambelli v. Historic Landmarks, Inc., 1995 WL 116669 at *3 (E.D.Pa. Mar. 20, 1995); Shaner, 561 A.2d at 1132. This framework has three steps: (1) the plaintiff bears the burden of establishing a prima facie case of discrimination; (2) the burden then shifts to the defendant, who must offer a legitimate non-discriminatory reason for the action; and (3) if the defendant satisfies this burden, the plaintiff must

then come forth with evidence indicating that the defendant's proffered reason is merely a pretext. See Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 1093-94, 67 L.Ed.2d 207 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973).

The district court determined that McNemar failed to establish a prima facie case of discrimination under the criteria articulated above because he admitted that he was not qualified to perform his job as Assistant Manager at Disney, and that he is thus judicially estopped from arguing that he is now "qualified" under the ADA and the NJLAD. Dist. Ct. Op. at 8-9. Under the facts of this case, we will not disturb that determination.

VI.

McNemar and the amici challenge the district court's application of the doctrine of judicial estoppel here, arguing at great length that the court unjustifiably has ***620** stretched the doctrine to address a problem that properly should be decided by looking to the legislative purposes of anti-discrimination that underlie the ADA. This is essentially the position of the court in Smith v. Dovenmuehle Morg., Inc., 859 F.Supp. 1138, 1141-43 (N.D.Ill.1994), a case which the district court below studied and rejected. In Smith, a plaintiff with AIDS received disability benefits from the Social Security Administration on the representation that he was disabled, then sued his former employer under the ADA. In holding that the plaintiff was not judicially estopped from arguing that he was qualified under the ADA, the court reasoned that to hold otherwise would put the

plaintiff "in the untenable position of choosing between his right to seek disability benefits and his right to seek redress for an alleged violation of the ADA." Id. at 1142. The Smith court reasoned also that judicial estoppel would frustrate the ADA's purpose of combatting discrimination against disabled persons. Id.

In explaining its disagreement with the Smith court, the district court below addressed much of the challenge presented by the amici on the judicial estoppel issue. First, after recognizing the apparent unfairness of forcing individuals to choose between seeking disability benefits and suing under the ADA, the district court concluded that, nevertheless, "there is no indication that either the United States Congress or the New Jersey legislature intended to provide disability benefits to persons capable of obtaining gainful employment, and it is the province of the legislature rather than this Court to authorize such a double recovery." Dist. Ct. Op. at 11. Second, the district court reasoned that because a disabled person who believes he or she has been the victim of discrimination "retains the option of filing suit pursuant to the ADA, this Court fails to understand how the ADA's goals would be thwarted by adopting the principle of judicial estoppel in this case." Id. at 11-12.

The Employment Law Center, one of the amici curiae, argues that because "[t]he Social Security disability system and the [ADA]'s determination of disability diverge significantly in their respective legal standards and statutory intent," application of judicial estoppel "between them is thus inappropriate." Amicus Br. of Employment Law Center, et. al., at 4. Similarly, McNemar argues that, because AIDS is listed as a "presumptive

disability" on the Social Security application forms, his representations that he is "totally and permanently disabled" do not render him unqualified to perform the job of Assistant Manager at Disney under the ADA and NJLAD. We disagree.

The fact that AIDS is listed as a "presumptive disability" on the benefit application forms is irrelevant to the case at hand, because the "presumptive disability" status serves only to eliminate the requirement that individuals afflicted with AIDS offer evidence that they are unable to perform their previous jobs. Whatever the Social Security Administration's criteria for eligibility for disability benefits, the fact remains that McNemar told the U.S. Government and the states of New Jersey and Pennsylvania under penalty of perjury that he was physically unable to work, and the district court had the discretion to judicially estop him from taking a contradictory position in this proceeding.

Moreover, we are troubled by this argument from Appellant and two amici, the Employment Law Center and the EEOC, for it carries the implication that a person afflicted with HIV somehow should be permitted to misrepresent important information. The fact that the choice between obtaining federal or state disability benefits and suing under the ADA is difficult does not entitle one to make false representations with impunity. Nothing in the reasoned jurisprudence of judicial estoppel goes this far. Nothing grants a person the authority to flout the exalted status that the law accords statements made under oath or penalty of perjury. Nothing permits one to undermine the integrity of the judicial system "by playing fast and loose with the courts by asserting inconsistent positions." Ryan Operations, 81 F.3d at 358. Nothing vests such immunity.

VII.

The EEOC argues also that McNemar's sworn declaration of total disability is "after- *621 acquired evidence" that has no bearing on the prima facie issue of McNemar's status as a qualified individual with a disability. Yet the threshold question in this case, fully examined by the district court, is precisely whether McNemar is covered by the ADA for purposes of his prima facie case.

Nevertheless, the EEOC wants to mix apples--a plaintiff's prima facie case--with oranges--a defendant's non-discriminatory-reason. It seeks to analogize this case to the teachings of McKennon v. Nashville Banner Pub. Co., --- U.S. ---, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995), which address the doctrine of "after-acquired evidence" and establish it as an affirmative defense that becomes meaningful once the plaintiff has established a prima facie case of discrimination. At that point, the employer is required to articulate its non-discriminatory reason and then may assert its additional defenses, such as after-acquired evidence, which may limit damages. See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 523-24, 113 S.Ct. 2742, 2755-56, 125 L.Ed.2d 407 (1993).

We emphasize again that the relevant question in this case is whether McNemar established a prima facie case of discrimination, and because he has not, Disney has no obligation even to articulate a legitimate business reason for its decision. See Hicks, 509 U.S. at 507, 113 S.Ct. at 2747; Sempier v. Johnson & Higgins, 45 F.3d 724, 730-32 (3d Cir.), cert. denied, --- U.S. ---, 115 S.Ct. 2611, 132 L.Ed.2d 854 (1995). Seen in this light, the EEOC's assertion that "[a] plaintiff's claim cannot

be defeated by an issue of qualifications that has nothing to do with the employer's motivation for the adverse action" (FN9) becomes irrelevant, again because that assertion has to do with Disney's putative pretext for firing McNemar, which is not a proper concern for the court unless McNemar first has established a prima facie case that he was qualified for the job. This he failed to do.

VIII.

We turn now to Appellant's other contentions.

A.

[8] [9] McNemar alleges that Disney violated Sec. 510 of ERISA, 29 U.S.C. Sec. 1140, because one of the determining factors in Disney's decision to discharge McNemar was to prevent the vesting of his pension rights with Disney eleven months later. (FN10) To establish a prima facie case under ERISA, McNemar was required to show: (1) that he belongs to the protected class; (2) that he was qualified for the position involved; and (3) that he was discharged or denied employment under circumstances that provide some basis for believing that the prohibited intent (to interfere with the employee's attainment of pension eligibility) was present. See Turner v. Schering-Plough Corp., 901 F.2d 335, 347 (3d Cir.1990) (citing Dister v. Continental Group, Inc., 859 F.2d 1108, 1115 (2d Cir.1988)).

For the reasons presented above, McNemar cannot establish the second required element for making a prima facie case under ERISA--that he is qualified for the position involved.

Because McNemar has not, as a matter of law, established a prima facie case of a Sec. 510 violation, the district court properly entered judgment in favor of Disney on its motion for summary judgment regarding McNemar's ERISA claim.

B.

New Jersey has recognized that the tort of invasion of privacy is "not one tort, but ... ***622** comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name...." Rumbauskas v. Cantor, 138 N.J. 173, 649 A.2d 853, 856 (1994) (quoting Canessa v. J.I. Kislak, Inc., 97 N.J.Super. 327, 235 A.2d 62, 66 (Law Div.1967)). McNemar contends that Disney is liable for two of these: (1) intrusion upon his seclusion, and (2) public disclosure of private information. We disagree.

1.

[10] New Jersey has adopted Sec. 652B of the Restatement (Second) of Torts, which states:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Figured v. Paralegal Technical Services, Inc., 231 N.J.Super. 251, 555 A.2d 663, 666 (App.Div.1989) (quoting 3 Restatement (Second) of Torts Sec. 652 B (1977)). Although the intrusion need not be by physical intrusion, the examples set

forth in the Restatement all contain elements of involuntariness. See Rumbauskas, 649 A.2d at 857.

McNemar argues that Disney is liable for intrusion upon his seclusion because Joelyn Ale asked him whether he was HIV-positive. However, Ale's inquiry does not appear to have imposed an aspect of involuntariness on McNemar; indeed, McNemar has admitted that Ale's intent in the conversation about his condition was to be supportive, not confrontational. JA 30. McNemar certainly was not compelled to, and in fact did not, tell Ale about his condition. In light of this evidence, Ale's inquiry hardly was coercive, let alone "highly offensive to a reasonable person," and thus was not an invasion of privacy under New Jersey law.

2.

[11] [12] On the second basis of invasion of privacy--public disclosure of private information--McNemar alleges that Disney invaded his privacy by publicly disclosing private facts when, in late November 1993, an assistant store manager told Julia Walsh, a friend of McNemar's, that he had resigned because he had AIDS. To state a claim for public disclosure of private facts, a plaintiff must demonstrate (1) that the defendant has given publicity to matters that actually were private, (2) that dissemination of such facts would be offensive to a reasonable person, and (3) that there is no legitimate interest of the public in being apprised of the facts publicized. Bisbee v. John C. Conover Agency, Inc., 186 N.J.Super. 335, 452 A.2d 689, 691-92 (App.Div.1982) (adopting 3 Restatement (Second) of Torts Sec. 652 D).

The Restatement defines "publicity" as follows:

> "Publicity" ... means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.... Thus it is not an invasion of the right to privacy ... to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons.

Restatement (Second) of Torts Sec. 652D, Comment (a). The evidence of McNemar's publicity consists primarily of allegations of (1) a disclosure by a store manager to McNemar's aunt and uncle that he "had resigned because it was too much" on his health, and (2) a disclosure by an unidentified store employee to a friend of McNemar's who already knew that he was HIV-positive. JA 284, 724-5. Clearly, as a matter of law, these allegations are not sufficient to state a prima facie case of invasion of privacy for publicity given to private facts. Accordingly, the district court properly granted Disney's motion for summary judgment on this element of McNemar's claim.

C.

[13] [14] [15] New Jersey law requires that a plaintiff who claims intentional infliction of emotional distress meet four requirements: (1) that the defendant acted recklessly or intentionally; (2) that the conduct was extreme and outrageous; (3) that the defendant's actions were the proximate cause of ***623.** the plaintiff's distress; and (4) that the plaintiff actually suffered severe emotional distress. Figured, 555 A.2d at 665 (quoting Buckley v. Trenton Saving Fund Soc., 111 N.J. 355,

544 A.2d 857, 863 (1988) and Restatement (Second) of Torts Sec. 46 (1965)).

McNemar's contention is unpersuasive because Disney's conduct was not extreme and outrageous, which under New Jersey law means conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." Figured, 555 A.2d at 665. The record does not offer any evidence to suggest that Disney's discharge of McNemar was extreme and outrageous. McNemar admits that his discharge was handled in a discreet manner, and that the reasons for his discharge were not disclosed to others. JA 39-40. Moreover, there is no evidence that Disney harassed McNemar in any way; and termination of employment does not, without evidence of harassment, support a claim of intentional infliction of emotional distress. See Heckroth v. Amer. Tel. & Tel., 1991 WL 157302 at *5 (E.D.Pa. Aug. 9, 1991) (citing Borecki v. Eastern Int'l Mgt. Corp., 694 F.Supp. 47, 61 (D.N.J.1988)). McNemar has not alleged harassment by Disney. Accordingly, the district court properly granted summary judgment in favor of Disney on McNemar's intentional infliction of emotional distress claim.

* * * * * *

We have considered all arguments presented by the parties and conclude that no further discussion is necessary.

The judgment of the district court will be affirmed.

FN1. At the time of the incident, Disney maintained a policy strictly prohibiting employees from commingling their own money with store money or from using store money for

personal purposes. In the three years since the policy has been in effect, Disney has terminated 52 employees (including McNemar) for violations of the policy. In several of these instances, the amount of money at issue was comparable to the two dollars at issue here. See Dist. Ct. Op. at 3-4; JA 990-93.

FN2. In that sworn statement, McNemar averred the following:

My name is Leonard C. McNemar.

My social security number is - - - - - - - - - -.

....

I became unable to work because of my disabling condition on October 01, 1993.

I am still disabled.

....

I understand that I must provide medical evidence about my disability, or assist the social security administration in obtaining the evidence.

....

I agree to notify the Social Security Administration if:

--My medical condition improves so that I would be able to work, even though I have not yet returned to work.

....

The above events may affect my eligibility to disability benefits as provided in the Social Security Act, as amended.

....

My reporting responsibilities have been explained to me.

I know that anyone who makes or causes to be made a false statement or misrepresentation of a material fact in an application or for use in determining a right to payment under the Social Security Act commits a crime punishable under federal law by fine, imprisonment or both. I affirm that all information I have given in connection with this claim is true.

....

Signature / Leonard C. McNemar / Date: 12-2-93

JA 985-88.

FN3. That S.S.I. Application reads, in relevant part, as follows:

My name is LEONARD C. McNEMAR. My social security number is - - - - - - - - -.

....

I am disabled. My disability began on October 12, 1993.

....

I have health insurance that pays towards the cost of my medical care.

IMPORTANT INFORMATION--PLEASE READ CAREFULLY

You must report any change within 10 days after the end of the month it occurs.

....

I understand that anyone who knowingly lies or misrepresents the truth or who arranges for someone to knowingly lie or misrepresent the truth is committing a crime which can be punished under federal law, state law, or both. Everything on this application is the truth as best I know it.

SIGNATURE / Leonard C. McNemar / DATE: 12-2-93

JA 174-77.

FN4. On that application, McNemar certified as follows:

I was unable to work during the period for which benefits are claimed and hereby certify that I have read and understood my benefit rights. Also, I certify that the foregoing statements made by me on this form are true. I am aware that if any of the foregoing statements made by me are willfully false, I may be subject to penalties, which

include criminal prosecution. You are hereby authorized to obtain any medical and employment information that is necessary to determine the eligibility of this claim.

SIGNATURE / Leonard C. McNemar / DATE: 12-2-93

JA 166.

*623_ FN5. At the conclusion of that form, on which McNemar indicated that "the first date on which [he was] unable to work because of this disability" was "10/12/93," he signed a statement certifying that:

I was unable to perform the duties of my regular occupation during the period for which benefits are claimed and hereby certify that information furnished by me on my original application and on this form is true. I know that the law provides penalties for false statements made to obtain benefits.

JA 168.

FN6. These included discrimination in violation of NJLAD, defamation, invasion of privacy, violation of public policy, intentional infliction of emotional distress, disclosing medical records of an individual with AIDS, and breach of an implied duty of good faith and fair dealing.

FN7. These were defamation, violation of public policy, disclosing medical records of an individual with AIDS, and breach of an implied duty of good faith and fair dealing.

FN8. On this point, Appellant relies significantly on Overton v. Reilly, 977 F.2d 1190, 1196 (7th Cir.1992) ("[E]ven if a finding of disability could have preclusive effect in a private lawsuit, such a finding is consistent with a claim that the disabled person is 'qualified' to do his job under the Rehabilitation Act.") (footnote omitted). We have difficulty accepting the relevance of Overton for several reasons.

> First, we are not convinced that the Overton facts are sufficiently similar to the facts at bar to be persuasive. In Overton, significant evidence existed that the plaintiff was able to perform his duties subsequent to the Social Security determination: "But the evidence that Overton completed a large number of file reviews and permits, that his work was adequate and that his research paper was well received does tend to show that Overton was able to carry on substantial gainful activity." Overton, 977 F.2d at 1196. Moreover, Overton did not involve judicial estoppel; the court did not address it, and the parties did not appear even to argue it. Finally, the Seventh Circuit recently has applied judicial estoppel in a case more like the case at bar. In DeGuiseppe v. Village of Bellwood, 68 F.3d 187, 191-92 (7th Cir.1995), the court applied judicial estoppel to preclude a plaintiff from asserting that the defendant had unlawfully discharged him where the plaintiff had testified during his pension board hearing that he had ceased working because he was totally and permanently disabled and unable to work.

FN9. EEOC Amicus Br. at 12 (citing Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1228 (3d Cir.1994), vacated, --- U.S. ----, 115 S.Ct. 1397, 131 L.Ed.2d 286 (1995),

modified 65 F.3d 1072 (3d Cir.1995)).

FN10. Section 510 provides in relevant part:

> It shall be unlawful for any person to discharge, fine, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan ... or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan....
>
> 29 U.S.C. Sec. 1140. Disney employees' pension rights vest after the employee has been with the company for five years. Here, McNemar had been a Disney employee for four years, one month. JA 43-44.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-1590

LEONARD C. MCNEMAR
Appellant

v.

THE DISNEY STORE, INC.
Appellee

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGARD, ALITO, ROTH, LEWIS, McKEE, and ALDISERT,* Circuit Judges

The petition for rehearing filed by appellant in the above-titled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

Walter K. Stapleton
Circuit Judge

Dated: SEP 16 1966

*Senior Judge Aldisert's vote is limited to rehearing before the original panel only.

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Not Reported in F.Supp.
64 USLW 2063, 4 A.D. Cases 897, 11 A.D.D. 240, 6 NDLR P 398
(Cite as: 1995 WL 390051 (E.D.Pa.))

Leonard C. McNEMAR

v.

THE DISNEY STORES, INC. a subsidiary of The Walt Disney Company

No. CIV. A. 94-6997.

United States District Court,
E.D. Pennsylvania.

June 30, 1995.

MEMORANDUM

NEWCOMER, J.

***1** Presently before the Court is defendant's Motion for Summary Judgment, and plaintiff's response thereto. For the reasons that follow, this Court will grant defendant's motion.

I. Background

Plaintiff Leonard McNemar brings this action against him former employer, The Disney Store, Inc. ("Disney"). McNemar, who suffers from AIDS, claims that Disney terminated his

employment in violation of the Americans with Disabilities Act ("ADA") and the New Jersey Law Against Discrimination ("NJLAD"). McNemar also asserts a claim under § 510 of the Employee Retirement Income Security Act ("ERISA"), as well as New Jersey state law claims for invasion of privacy and intentional infliction of emotional distress. [FN1]

Drawing all inferences in favor of McNemar, the nonmoving party, and accepting his factual allegations as true for purposes of this discussion, the facts of this case are as follows. McNemar was hired by The Disney Store, Inc., a wholly owned subsidiary and the retail operation of The Walt Disney Company, in 1989. The Disney Stores sell Disney related products in a manner designed to promote the Disney image of animated theater. McNemar held different positions at Disney, starting as Receiving Manager at Disney's Cherry Hill, New Jersey store, moving up to Second Assistant Manager at Disney's Christiana, Delaware store, and finally being promoted to Assistant Store Manager at the Cherry Hill store. McNemar received positive performance evaluations throughout his tenure at Disney.

In October 1993, McNemar was diagnosed with AIDS. [FN2] He told this information to a small group of friends, including Lillian Forcey, his Store Manager at Disney's Cherry Hill store. Two Disney managers at the Christiana store also knew of McNemar's illness. Several other Disney employees were aware of his condition.

After a brief hospitalization following his diagnosis, McNemar returned to work at the Cherry Hill store in November 1993. On November 8, 1993, the District Manager, Joelyn Ale,

summoned McNemar to her office and informed him that she had heard rumors that he had tested positive for HIV, the Human Immunodeficiency Virus. She asked McNemar if the rumors were true. At that time, McNemar denied that he was HIV-positive.

On November 16, 1993, McNemar was the manager responsible for closing the Cherry Hill store. That night, McNemar asked an employee, Estelle Williamson, to purchase cigarettes for him at another store in the mall before she left. Because Disney has a policy that all employees must store their personal belongings in lockers in the back of the store, McNemar had no cash on his person. Rather than run back to retrieve money from his wallet, McNemar took two dollars from the cash register and gave it to Williamson to purchase the cigarettes. There is some dispute as to whether he replaced the money in the store's safe fund at the end of the night.

Williamson purchased McNemar's cigarettes and then called Disney's Loss Prevention Hotline to report that McNemar had taken money from the register in violation of Disney's antishrinkage policies. [FN3] At the time of this incident, Disney followed a very strict policy prohibiting employees from commingling their own money with store money or using store money for personal purposes. In the three years that the policy has been in effect, Disney has terminated 52 employees (including McNemar) for violations of the policy. In some of these instances, the amount of money at issue was comparable to the $2.00 at issue in this case. For example, in May 1993, Disney terminated a Store Manager for taking $10.00. In September 1993, Disney terminated a "Cast Member" (i.e., store employee) for taking $2.50 worth of merchandise. In March

1994, Disney terminated an Assistant Manager for taking $7.00 worth of supplies, and in May 1994, Disney terminated two Cast Members for taking $3.00 and $5.00 worth of merchandise, respectively. In September 1994, Disney terminated an Assistant Manager for merely violating the company's Loss Prevention procedures, despite the fact that no money was involved.

*2 On November 18, 1993, McNemar was again summoned to Ale's office. Ale told McNemar that Disney's Loss Prevention department had received reports that he had taken money from a cash register in violation of Disney's policies, and Ale asked McNemar to confirm or deny the allegation. At that meeting, which was also attended via speakerphone by Jeff Hill, a member of Disney's Loss Prevention Department, Ale and Hill asked McNemar about the incident. McNemar broke down in tears, apologized, and admitted that he had taken the cash. He was suspended and asked to return his store keys and identification. He also wrote and signed a statement recounting the incident. Finally, at that meeting, McNemar told both Ale and Hill that he did have AIDS. Several hours after the meeting, Ale informed McNemar that he was being terminated.

Following his dismissal, McNemar applied for and received disability benefits from the Social Security Administration and the New Jersey Department of Labor. He was advised by a caseworker at the New Jersey Department of Labor that he was eligible to receive Social Security and state disability benefits despite the fact that he was able to work. He has been unemployed since his termination from Disney.

Following McNemar's termination, Disney disclosed, without

permission, that McNemar had AIDS. In late November 1993, a friend of McNemar's, Julia L. Walsh, called the Cherry Hill store to speak with McNemar. She was told by a person identifying herself as the Assistant Manager that McNemar had resigned because he had AIDS.

II. Legal Standard

A reviewing court may enter summary judgment where there are no genuine issues as to any material fact and one party is entitled to judgment as a matter of law. White v. Westinghouse Electric Co., 862 F.2d 56, 59 (3d Cir.1988). "The inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one sided that one party must, as a matter of law, prevail over the other." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

The moving party has the initial burden of identifying evidence which it believes shows an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Childers v. Joseph, 842 F.2d 689, 694 (3d Cir.1988). The moving party's burden may be discharged by demonstrating that there is an absence of evidence to support the nonmoving party's case. Celotex, 477 U.S. at 325. Once the moving party satisfies its burden, the burden shifts to the nonmoving party, who must go beyond its pleading and designate specific facts by use of affidavits, depositions, admissions, or answers to interrogatories showing there is a genuine issue for trial. Celotex, 477 U.S. at 324. Moreover, when the nonmoving party bears the burden of proof, it must "make a showing sufficient to establish the existence of [every] element essential to that party's case." Equimark Commercial Fin. Co. v. C.I.T. Fin. Servs. Corp., 812

F.2d 141, 144 (3d Cir.1987) (quoting Celotex, 477 U.S. at 322). Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." White, 862 F.2d at 59 (quoting Celotex, 477 U.S. at 322).

III. Discussion

*3 A. Plaintiff cannot survive a motion for summary judgment on Counts I and II

In Counts I and II, McNemar alleges that Disney violated the Americans with Disabilities Act ("ADA") and the New Jersey Law Against Discrimination ("NJLAD") when it terminated his employment.

Because the NJLAD utilizes the same analytical framework as does the ADA, see Shaner v. Horizon Bancorp., 116 N.J. 433, 561 A.2d 1130 (1989), this Court will address the ADA and NJLAD claims together. In adjudicating cases brought under the ADA and NJLAD, courts apply the burden-shifting framework applicable to cases brought under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 12117; Zambelli v. Historic Landmarks, Inc., 1995 WL 116669 (E.D. Pa. Mar. 20, 1995); Shaner, 116 N.J. 433. Under this framework: (1) the plaintiff bears the burden of establishing a prima facie case of discrimination, (2) the burden then shifts to the defendant, who must offer a legitimate nondiscriminatory reason for the action, and (3) if the defendant satisfies this burden, the plaintiff must then come forth with evidence indicating that the defendant's proffered reason is merely a pretext. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981);

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

This Court finds that McNemar has failed to establish a prima facie case of discrimination. The ADA requires as a condition of recovery that the plaintiff is a "qualified individual who, with or without reasonable accommodation, can perform the essential functions of the job." 42 U.S.C. § 12112(a) (emphasis added). The NJLAD has a similar requirement, prohibiting discrimination against handicapped persons "unless the nature and extent of the handicap reasonably precludes the performance of the particular employment." N.J.S.A. § 10:5-4.1. Here, McNemar has admitted that he is not qualified to perform the job of Assistant Manager; on his applications for Social Security Disability benefits and New Jersey disability benefits, McNemar and his physicians certified under penalty of perjury that he was "totally and permanently disabled." [FN4] In addition, McNemar's physician represented that McNemar suffered from a "total and permanent disability" in order to exempt McNemar from repaying his student loans. [FN5] Accordingly, McNemar is estopped from arguing now that he is "qualified" under the ADA and NJLAD. Although the Third Circuit has not directly addressed this issue, most federal courts agree that an employee who represents on a benefits application that he is disabled is judicially estopped from arguing that he is qualified to perform the duties of the position involved. See, e.g., August v. Offices Unlimited, Inc., 981 F.2d 576 (1st Cir.1992) (plaintiff who certified on form for disability benefits that he was "totally disabled" was precluded as a matter of law from arguing that he was a "qualified handicapped person" under Massachusetts law); Garcia-Paz v. Swift Textiles, 873 F.Supp. 547, 554 (D. Kan.1995) (plaintiff with multiple sclerosis who certified on long-term disability benefits application that she

was "unable to perform material duties of work" was estopped from arguing that she was a qualified individual under ADA); Kennedy v. Applause, Inc., 1994 WL 740765 (C.D. Cal. Dec. 6, 1994) (plaintiff with chronic fatigue syndrome who represented for purposes of obtaining disability benefits that she was completely disabled was estopped from arguing that she was qualified under ADA); Reigel v. Kaiser Foundation Health Plan of N.C., 859 F.Supp. 963, 967-70 (E.D.N.C.1994) (plaintiff with shoulder injury who claimed for purposes of receiving disability insurance payments that she was permanently disabled was estopped from arguing that she was qualified under ADA).

***4** McNemar argues that his representations that he is "totally and permanently disabled" do not render him unqualified to perform the job of Assistant Manager at Disney under the ADA and NJLAD because AIDS is listed as a "presumptive disability" on the Social Security application forms. This Court cannot agree. The fact that AIDS is listed as a "presumptive disability" on the benefit application forms is irrelevant. The "presumptive disability" status serves only to eliminate the requirement that individuals afflicted with AIDS offer evidence that they are unable to perform their previous jobs. Instead, that conclusion is inferred from the AIDS diagnosis.

Here, the uncontroverted fact is that McNemar received benefits because he claimed that he was unable to work. He cannot be simultaneously "unable to work" and "qualified to perform the duties of his position." As the Reigel court stated:

> Plaintiff in the case sub judice cannot speak out of both sides of her mouth with equal vigor and credibility before this court. Plaintiff now seeks money damages from [her employer] on

> her assertion that she was physically willing and able to work during the same period that she was regularly collecting disability payments on her assertion that she was physically unable to work.

Reigel, 859 F.Supp. at 970.

This Court has located one case, not cited by either party, with facts nearly identical to the case at bar. Smith v. Dovenmuehle Mortg., Inc., 859 F.Supp. 1138, 1141-43 (N.D. Ill.1994). However, this Court rejects the Smith court's reasoning. In Smith, a plaintiff with AIDS received disability benefits from the Social Security Administration on the basis of his representation that he was disabled. He then sued his former employer under the ADA. In holding that the plaintiff was not judicially estopped from arguing that he was qualified under the ADA, the court reasoned that to hold otherwise would place the plaintiff "in the untenable position of choosing between his right to seek disability benefits and his right to seek redress for an alleged violation of the ADA." Id. at 1142. The court also reasoned that judicial estoppel would frustrate the ADA's purpose of combatting discrimination against disabled persons. Id.

This Court cannot agree with the Smith court's reasoning. First, while this Court recognizes the apparent unfairness of forcing individuals to choose between seeking disability benefits and suing under the ADA, there is no indication that either the United States Congress or the New Jersey legislature intended to provide disability benefits to persons capable of obtaining gainful employment, and it is the province of the legislature rather than this Court to authorize such a double recovery. Second, since a disabled person who believes he has been the victim of discrimination retains the option of filing suit pursuant

to the ADA, this Court fails to understand how the ADA's goals would be thwarted by rejecting the principle of judicial estoppel in this case.

*5 In sum, no reasonable factfinder could find that McNemar has established that he was qualified to perform the job of Assistant Manager at Disney. Accordingly, this Court will enter summary judgment for Disney on Counts I and II.

B. Count III: ERISA Claim

In Count III, McNemar alleges that Disney violated § 510 of ERISA, 29 U.S.C. § 1140, because one of the determining factors in Disney's decision to discharge McNemar was to prevent the vesting of his pension rights with Disney eleven months later. [FN6]

McNemar has failed to establish a prima facie case under ERISA because he has admitted that he is not qualified for the position. In Turner v. Schering- Plough Corp., 901 F.2d 335 (3d Cir.1990), the Third Circuit expounded on the burden of an employee in a § 510 case. The court explained that a prima facie case under § 510 of ERISA requires a showing that the employee: (1) belongs to the protected class; (2) was qualified for the position involved; and (3) was discharged or denied employment under circumstances that provide some basis for believing that the prohibited intent [to interfere with the employee's attainment of pension eligibility] was present. Id. at 347 (citing Dister v. Continental Group, Inc., 859 F.2d 1108, 1115 (2d Cir.1988)). For the reasons stated infra with regard to Counts I and II, McNemar cannot, as a matter of law, establish that he is qualified for the position involved. Therefore,

McNemar has not established a prima facie case of a § 510 violation, and this Court will enter judgment for Disney on Count III.

C. State law claims

Since this Court has determined that summary judgment in Disney's favor is appropriate on the federal claims, only the state law claims remain. Under the 1990 enactment of the supplemental jurisdiction statute, 28 U.S.C. § 1367, a federal district court may decline to exercise its supplemental jurisdiction over state law claims if all federal claims are dismissed. 28 U.S.C. § 1367(c)(3); Growth Horizons, Inc. v. Delaware County, Pa., 983 F.2d 1277, 1285 n. 14 (3d Cir.1993). In exercising its discretion, the district court should take into account principles of judicial economy, convenience, and fairness to the litigants. Id. at 1984 (citing United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966)). As one legal scholar has observed:

> Whether a dismissal of the touchstone claim should bring about a dismissal ... of the dependent claim for want of supplemental jurisdiction should hinge on the moment within the litigation when the dismissal of the touchstone claim takes place and on the other surrounding circumstances.... [I]f the dismissal of the main claim occurs late in the action, after there has indeed been substantial expenditure in time, effort and money in preparing the dependent claims, knocking them down with a belated rejection of supplemental jurisdiction may not be fair. Nor is it by any means necessary.

***6** David D. Siegel, Practice Commentary, appended to 28 U.S.C.A. § 1367 (cited in Growth Horizons, 1284 F.2d at 1284).

In this case, the case is scheduled to proceed to trial in one week. The parties have expended considerable effort and financial resources over a period of several months on preparation for trial. To dismiss the state law claim at this juncture for lack of jurisdiction would be unfair. Therefore, this Court will address the merits of Disney's motion as it pertains to McNemar's state law claims.

1. Claim for Invasion of Privacy

In Count VI, McNemar seeks damages for invasion of privacy. New Jersey has recognized that the tort of invasion of privacy is "not one tort, but a complex of four. The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name...." Rumbauskas v. Cantor, 138 N.J. 173, 649 A.2d 853 (1994) (quoting Canessa v. J.I. Kislak, Inc., 97 N.J.Super. 327, 235 A.2d 62 (Law Div.1967). In this case, McNemar claims that Disney is liable for two forms of the tort of invasion of privacy: (1) intrusion upon his seclusion, and (2) public disclosure of private information.

First, McNemar alleges that Disney is liable for intrusion upon seclusion because Joelyn Ale asked him whether he was HIV-positive. New Jersey has adopted § 652B of the Restatement (Second) of Torts, which states as follows:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Figured v. Paralegal Technical Services, Inc., 555 A.2d 663,

666 (N.J.Super. Ct.App. Div.1989) (quoting 3 Restatement (Second) of Torts § 652B (1977)). While it is not necessary that the invasion be by physical intrusion, the cases describing this tort make clear that the invasion must be more than what is alleged in this case. The Restatement provides five illustrations of this tort: (1) the photographing of a hospitalized woman by a newspaper reporter despite the woman's objections; (2) the use of a telescopic lens by a private detective to take pictures inside a person's bedroom; (3) the tapping of an individual's telephone lines and recording of her conversations by a private detective; (4) the forging of a court order in order to examine a private individual's bank account; and (5) the daily telephoning of a socialite by a professional photographer in order to solicit the socialite's business. Rumbauskas v. Cantor, 138 N.J. 173, 182, 649 A.2d 853, 857 (1994) (citing Restatement § 652B, cmt. b, illustrations 1-5 (1977)). Unlike the case at bar, these examples contain an element of involuntariness. Here, Ale merely inquired as to the truthfulness of rumors circulating among Disney employees. McNemar was not compelled to, and in fact did not, tell Ale the truth about his condition. Thus, her question is not "highly offensive to a reasonable person" and is not an invasion of privacy under New Jersey law.

*7 Second, McNemar alleges that Disney invaded his privacy by publicly disclosing private facts. To state a claim for public disclosure of private facts, a plaintiff must demonstrate that the defendant gave publicity to matters which were actually private, that dissemination of such facts would be offensive to a reasonable person, and that there is no legitimate interest of the public in being apprised of the facts publicized. Bisbee v. John C. Conover Agency, Inc., 186 N.J. Super 335, 340, 452 A.2d

689 (App. Div.1982) (adopting 3 Restatement (Second) of Torts § 652D). Comment (a) to § 652D states that the term "publicity" as used in the Restatement:

> means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.... Thus it is not an invasion of the right of privacy ... to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons.

See also 3 James H. Walzer, New Jersey Practice § 19.70 n. 3 (4th ed.1991); Wood v. National Computer Systems, Inc., 814 F.2d 544, 545 (8th Cir.1987); Lewis v. Snap-On Tools Corp., 708 F.Supp. 1260, 1262 (M.D. Fla.1989).

Here, McNemar alleges only that a single person was told of his condition. As a matter of law, this allegation is not sufficient to state a prima facie case of invasion of privacy for publicity given to private facts. Therefore, this Court will grant Disney's motion for summary judgment on this element of plaintiff's claim.

2. Claim for Intentional Infliction of Emotional

Distress

In Count IX, McNemar states a claim for intentional infliction of emotional distress. In New Jersey, a plaintiff claiming intentional infliction of emotional distress must meet four requirements: (1) the defendant acted recklessly or intentionally; (2) the conduct was extreme and outrageous; (3) the defendant's actions were the proximate cause of the plaintiff's distress; and (4) the plaintiff actually suffered extreme

emotional distress. Obendorfer v. Gitano Group, Inc., 838 F.Supp. 950, 955 (D.N.J.1993) (citing Buckley v. Trenton Savings Fund Soc., 544 A.2d 857 (N.J.1988) and Restatement (Second) of Torts § 46 (1965)).

Here, McNemar's claim must fail because Disney's conduct was not outrageous as a matter of law. The standard's "elevated threshold for liability and damages" requires that "the conduct be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Buckley, 544 A.2d at 863 (citing Restatement, supra). Moreover, absent additional evidence of harassment, termination of employment does not support a claim of intentional infliction of emotional distress. Heckroth v. Amer. Tel. & Tel., 1991 WL 157302 (E.D. Pa. Aug. 9, 1991) (citing Borecki v. Eastern Int'l Mat. Corp., 694 F.Supp. 47, 61 (D.N.J.1988)). See also Carney v. Dexter Shoe Co., 701 F.Supp. 1093 (D.N.J.1988); Brummer v. Abex Corp., 661 F.Supp. 1351, 1359 (D.N.J.1986). McNemar does not allege harassment by Disney. This Court will therefore grant summary judgment for Disney on Count IX.

***8** An appropriate Order follows.

ORDER

AND NOW, this day of June, 1995, upon consideration of defendant's Motion for Summary Judgment, and plaintiff's response thereto, and consistent with the foregoing Memorandum, it is hereby ORDERED as follows:

1. Judgment is ENTERED IN FAVOR of defendant Disney and

AGAINST plaintiff McNemar on Counts I, II, III, VI, and IX.

2. Counts IV, V, VII, and VIII are hereby DISMISSED.

AND IT IS SO ORDERED.

FN1. McNemar's complaint also sets forth state law claims for defamation, violations of the New Jersey AIDS Confidentiality Act, violations of New Jersey public policy, and breach of contract. In his Response to Defendant's Motion for Summary Judgment at 49 n. 16, however, McNemar withdraws these claims.

FN2. In McNemar's Memorandum of Law, he states that he was diagnosed with AIDS. Disney uses the term "HIV-positive." For simplicity, this Court will refer to McNemar's condition as AIDS.

FN3. Disney had a policy of awarding informants one hundred dollars for this information.

FN4. On December 2, 1993, McNemar certified under penalty of perjury on his application for Social Security benefits as follows:
I became unable to work because of my disabling condition on October 01, 1993.... I am still disabled.... I agree to notify the Social Security Administration if: ... my medical condition improves so that I would be able to work, even though I have not yet returned to work ... I agree to notify the Social Security Administration if I become entitled to a pension or annuity based on employment after 1956 not covered by

Social Security, or if such pension or annuity stops. (Appendix, Exhibit Q, attached to Reply Brief of Defendant The Disney Store, Inc, in Support of its Motion for Summary Judgment).

On that same date, McNemar certified to the New Jersey Department of Labor's Disability Insurance Service ("NJDIS") that he was "unable to work during the period for which benefits are claimed ..." (Exhibit M). The application form did not specify the dates for which benefits were claimed, except to note that McNemar was hospitalized from October 12, 1993 until October 19, 1993.

The record also includes a Request for Medical Information from the NJDIS to Dr. Lorenick. (Exhibit M). This form, which was completed and signed by Dr. Lorenick, lists the disability date as October 12, 1993 but states that McNemar "has/had been under my care for this period of disability from 10/16/93 through present " and that "The patient has been unable to perform the duties of his/her regular or usual job (i.e., too disabled to work) from 10/16/93."

FN5. On July 27, 1994, physician John Turner, certified on McNemar's student loan exemption form that McNemar was "permanently and totally disabled and so is unable to work and earn money because of an impairment that is expected to continue indefinitely or result in death." (Appendix, Exhibit O). The physician did so despite the fact that he could have described McNemar as "temporarily totally disabled."

FN6. Section 510 provides in relevant part as follows:

> It shall be unlawful for any person to discharge, fine, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan ... or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan ...
>
> 29 U.S.C. § 1140. Disney employees' pension rights vest after the employee has been with the company for five years. In this case, McNemar had been a Disney employee for four years and one month.

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Supreme Court, U.S.
FILED
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No. 96-966

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

LEONARD C. MCNEMAR,

Petitioner,

v.

THE DISNEY STORE, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The sole question presented by Petitioner is whether the doctrine of judicial estoppel as applied in the case at bar violated his rights under the Due Process Clause of the Fourteenth Amendment and his right to a jury trial under the Seventh Amendment. This question was not raised in any of the proceedings below and was not addressed by the Court of Appeals.

PARTIES TO THE PROCEEDING

The parties to this proceeding are Petitioner Leonard C. McNemar and Respondent The Disney Store, Inc. The Disney Store, Inc. is a wholly-owned subsidiary of Disney Enterprises, Inc., which in turn is a wholly-owned subsidiary of The Walt Disney Company, the shares of which are publicly traded.

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No. 96-966

IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals affirming the District Court's grant of summary judgment for Respondent The Disney Store, Inc. ("TDS"), on the basis that Petitioner Leonard C. McNemar ("McNemar") is judicially estopped from establishing a *prima facie* case under the Americans With Disabilities Act ("ADA"), is reported at 91 F.3d 610 (3d Cir. 1996), and is reproduced in the appendix attached to the petition, "Pet. App." at A. 1-32. The District Court's opinion, granting TDS summary judgment on that same issue, is

reported at 4 A.D. Cases 897 (E.D. Pa. 1995), can also be found at 1995 WL 390051, and is reproduced in Petitioner's appendix, Pet. App. at C. 1-18. The Court of Appeals' order denying Petitioner's rehearing petition is not reported and is reproduced in Petitioner's appendix, Pet. App. at B. 1.

STATUTES INVOLVED

Title I of the ADA, 42 U.S.C. § 12112(a), provides:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

Title I of the ADA, 42 U.S.C. § 12111(8) provides:

> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

STATEMENT OF THE CASE

On the particular facts of this case, the District Court granted summary judgment, unanimously affirmed on appeal, because McNemar failed to establish a *prima facie* case of disability discrimination under Title I of the ADA. 42 U.S.C. § 12112(a). Now, attempting to induce this Court to grant his Petition, McNemar asserts as his sole basis for review an argument never raised below, either by him or several supporting *amici curiae,* namely a sweeping but wholly unfounded constitutional attack on the well-established doctrine of judicial estoppel.

Below, McNemar had the burden of proving the essential predicate to any ADA claim — that at all material times he was able to perform the essential functions of the job with or without accommodation.[1] *McDonald v. Commonwealth of Pennsylvania,* 62 F.3d 92, 96 (3d Cir. 1995); *Deluca v. Winer Indus., Inc.,* 53 F.3d 793, 797 (7th Cir. 1995); EEOC Tech. Assist. Manual § 52.1. To be protected by Title I of the ADA, a plaintiff must prove that he or she is a "qualified person with a disability who, with or without reasonable accommodation, can perform the essential functions of the job." *Id.* A person who is not able to work is not covered by the ADA, is not within the class protected by Congress, and has no right to seek relief in the courts. *See* H.R. Rep. No. 101-485 (III), 101st Cong. 2d Sess. 454, 458 (1990).

In the District Court, at the close of discovery, TDS moved for summary judgment on the grounds that, *inter alia,* McNemar had failed to establish he was such a "qualified person." The undisputed evidence of record[2] established that McNemar had repeatedly and consistently asserted under penalty of perjury (supported by sworn statements from physicians) to three governmental agencies that he was totally and permanently disabled and unable to work prior to his termination and at all times relevant to his claim under the ADA. At his deposition in this case, McNemar affirmed that his statements and certifications were accurate.

The District Court granted summary judgment for TDS on the basis that, in light of his series of unvarying admissions under oath, McNemar was judicially estopped from arguing that he was a qualified person with a disability able to perform the job. Applying traditional summary judgment standards and the controlling law of the Circuit to the particular facts of this case, the District Court concluded that McNemar had failed to meet his threshold burden of proof under the ADA.

---

1. McNemar's counsel conceded in oral argument that accommodation is not an issue in this case. (A copy of pages 10-11 of the Transcript of Oral Argument is attached at Resp. App. A. 1-4).

2. The evidence presented to the District Court is fairly described in the Opinion of the Court of Appeals. (Pet. App. at 5-10). The facts set forth in footnote 1 of the Petition are inaccurate and unsupported by the record.

McNemar appealed from the District Court's judgment against him. The issue presented to, and addressed by, the Court of Appeals for the Third Circuit was whether, on the particular facts of this case, the District Court abused its discretion. Recognizing that the doctrine of judicial estoppel is factually driven, a unanimous three member panel of the Court of Appeals affirmed, stating:

> McNemar has represented to one federal agency and to the agencies of two different states that he was totally disabled and unable to work — while now, in claiming relief under the American Disabilities Act [sic], he states that he is 'a qualified person with a disability who, with or without reasonable accommodation, can perform the essential functions of a job' as contemplated by 42 U.S.C. Secs. 12111(8), 12112(a).

(Pet. App. at A. 14-15).[3] In these particular circumstances, the Court of Appeals held that McNemar was precluded from asserting the directly contrary position in this lawsuit.

REASONS FOR DENYING THE PETITION

There are three reasons for summarily denying the Petition: First, the constitutional arguments under the Fourteenth Amendment and Seventh Amendment to the Constitution were never raised or addressed in the proceedings below. Second, no court has ever held that the application of judicial estoppel violates the Fourteenth or Seventh Amendments. To the contrary, this Court has expressly rejected the theory on which the Petition is based. Third, there is no split in the circuits on the matters raised and addressed below. Every circuit

---

3. As the Court determined, Social Security and state disability benefits are available to disabled persons who are truly *unable* to work (*i.e.*, perform any job in the national economy), while the ADA protects those who are *able* to work. If McNemar and his doctors told the truth and he was unable to work, then he was not a member of the protected class under the ADA. If, however, McNemar and his doctors lied in order to obtain disability benefits, then he is properly precluded from asserting the directly contrary position. To hold otherwise would be tantamount to judicial condonation of fraud.

court of appeals which has considered a similar matter has reached the same result as the Third Circuit did here.

Hence, there are no special or important reasons for granting review of this matter, as required by Rule 10 of this Court's Rules.

I. The Constitutional Question Presented In Support Of The Petition Was Not Raised Or Passed Upon Below.

The sole question presented here — McNemar's broadside attack on judicial estoppel — was never raised or passed upon any where in any of the proceedings below. (A copy of the issues presented to the Third Circuit for review from briefs filed by Petitioner and the *amici curiae* supporting him are reproduced at Resp. App. B. 1-8).

Absent exceptional circumstances, this Court will not exercise its certiorari jurisdiction on a question which was not presented in the proceedings below. *Holly Farms Corp. v. National Labor Relations Bd.,* 116 S. Ct. 1396, 1402 n.7 (1996)("Because we generally do not address arguments that were not the basis for the decision below . . . we decline to entertain Holly Farms' . . . argument")(citation omitted); *Matsushita Elec. Indus. Co. v. Epstein,* 116 S. Ct. 873, 880 n.5 (1996)("While it is true that a respondent may defend a judgment on alternative grounds, we generally do not address arguments that were not the basis for the decision below"); *Lawn v. United States,* 355 U.S. 339, 362-63 n.16 (1958)("Only in exceptional cases will this Court review a question not raised in the court below"). There are no exceptional circumstances here, and McNemar has not even argued that there are. The Petition should therefore be denied.

II. The Courts Below Did Not Violate Petitioner's Right To Due Process Or The Right To A Jury Trial.

McNemar's disagreement with the Third Circuit cannot be elevated to the constitutional level. The Court of Appeals applied the governing law in the Circuit to the particular facts of the case, within the framework of applicable summary judgment standards under Rule 56 of the Federal Rules of Civil

Procedure. McNemar was given a full and fair opportunity to develop facts and oppose the grant.

McNemar cannot conjure up a constitutional argument under either the Fourteenth Amendment[4] or the Seventh Amendment simply because he lost on summary judgment and disagrees with the result. *See Fidelity Deposit Co. v. United States,* 187 U.S. 315, 319-21 (1902)(summary judgment does not violate due process or right to trial by jury); *see also Galloway v. United States,* 319 U.S. 372, 388-93 (directed verdict does not violate right to trial by jury), *reh'g denied,* 320 U.S. 214 (1943). Indeed, this Court has previously rejected the very argument McNemar makes here, holding that the use of an equitable doctrine to preclude a claim does not amount to a deprivation of due process rights under the Fourteenth Amendment or the right to a jury trial under the Seventh Amendment. *See Kremer v. Chemical Constr. Corp.,* 456 U.S. 461, 478 (collateral estoppel may, consistent with Due Process Clause of Fourteenth Amendment, preclude employment discrimination claim under Title VII), *reh'g denied,* 458 U.S. 1133 (1982); *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 333-37 (1979) (use of offensive collateral estoppel to preclude claim did not violate Seventh Amendment); *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 437 (1982)(not due process violation to preclude claim for failure to comply with procedural or evidentiary rule, including statue of limitation)(citing *Chase Securities Corp. v. Donaldson,* 325 U.S. 304, 314-16 (1945)).

The application of judicial estoppel to the specific facts of this case was neither vague nor arbitrary. Judicial estoppel has been part of our jurisprudence for more than a hundred years, emanating from *Davis v. Wakelee,* 156 U.S. 680 (1895), in

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4. The Due Process Clause of the Fourteenth Amendment could not even apply here. The Fourteenth Amendment requires state action, and here there is none because actions by federal courts do not constitute state action. *See Omni Capital Int'l v. Rudolf Wolff & Co.,* 484 U.S. 97 (1987)(actions by federal court governed by Due Process Clause of Fifth Amendment, not Fourteenth Amendment); *see also Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 429-30 (1982)(Fourteenth Amendment's protections apply to state action). The Fifth Amendment applies to alleged due process violations by the federal government, including federal courts. *See* U.S. Const. amend. V.

which this Court specifically recognized the principle that "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contradictory position. . . ." *Id.* at 689; *see also Michels v. Olmstead,* 157 U.S. 198 (1895).

When McNemar filed his action, judicial estoppel was firmly entrenched, specifically articulated, and consistently applied in the Third Circuit. *See E.F. Operating Corp. v. American Buildings,* 993 F.2d 1046 (3d Cir.), *cert. denied,* 510 U.S. 868 (1993); *Fleck v. KDI Sylvan Pools, Inc.,* 981 F.2d 107 (3d Cir. 1992), *cert. denied,* 507 U.S. 1005 (1993); *Delgrosso v. Spang and Co.,* 903 F.2d 234 (3d Cir.), *cert. denied,* 498 U.S. 967 (1990); *Lewandowski v. National R.R. Passenger Corp.,* 882 F.2d 815 (3d Cir. 1989); *Oneida Motor Freight, Inc. v. United Jersey Bank,* 848 F.2d 414 (3d Cir.), *cert. denied,* 488 U.S. 967 (1988); *Scarano v. Central R.R. Co.,* 203 F.2d 510 (3d Cir. 1953). There is no basis to conclude that McNemar lacked notice or was denied the opportunity to be heard concerning the application of judicial estoppel to the particular facts of this case.[5] *See Richards v. Jefferson County,* 116 S. Ct. 1761, 1765-66 (1996) (due process requires notice and opportunity to be heard). Hence, there was no deprivation of McNemar's due process rights under the Fourteenth (or Fifth) Amendment or his right to a jury trial under the Seventh Amendment.

III. There Is No Split Among The Circuits On The Issue Presented To The Court Of Appeals.

Without citing a single Court of Appeals case, McNemar would have this Court believe that the Circuits are split on the

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5. During the pendency of the appeal, the Third Circuit issued its decision in *Ryan Operations A.P. v. Santram-Midwest Lumber Company,* 81 F.3d 355 (3d Cir. 1996). There, the court articulated the following two-part test for the application of judicial estoppel: (1) Is the party's present position inconsistent with a position formerly asserted? (2) If so, did the party assert either or both of the inconsistent positions in bad faith — *i.e.,* with the intent to "play fast and loose" with the court? *Id.* at 361. Both parties were asked by the Court of Appeals to submit supplemental briefs addressing the impact of this decision on the issues in this case and did so.

matter raised by his lawsuit. This is simply untrue. Every circuit court faced with the same or similar issue has ruled in the same way as the Third Circuit did here. *See, e.g., Parker v. Metropolitan Life Ins. Co.*, 99 F.3d 181 (6th Cir. 1996) (plaintiff precluded from bringing ADA claim on basis of previous statements in disability benefits application); *Kennedy v. Applause, Inc.*, 90 F.3d 1477 (9th Cir. 1996)(plaintiff precluded from bringing ADA claim based upon statements in Social Security disability benefits application); *Simo v. Home Health & Hospice Care*, 1995 WL 674489 (1st Cir. Nov. 14, 1995) (affirming district court's preclusion of plaintiff's ADA claim on basis of previous certifications in Social Security benefits application); *DeGuiseppe v. Village of Bellwood*, 68 F.3d 187 (7th Cir. 1995) (plaintiff precluded from bringing § 1983 claim because of prior testimony at pension board hearing that unable to work); *August v. Offices Unlimited*, 981 F.2d 576 (1st Cir. 1992) (plaintiff precluded from bringing action under state anti-discrimination law because of statements in disability benefits application); *Beauford v. Father Flanagan's Boys' Home*, 831 F.2d 768 (8th Cir. 1987) (plaintiff precluded from bringing Rehabilitation Act claim because of certifications in disability benefits application), *cert. denied*, 485 U.S. 938 (1988); *see also Rissetto v. Plumbers and Steamfitters Local 353*, 94 F.3d 597 (9th Cir. 1996) (applying judicial estoppel to preclude plaintiff from asserting *prima facie* case under Age Discrimination in Employment Act). McNemar has not cited any conflicting circuit court decision.

The overwhelming majority of district courts in circuits other than the Third Circuit have also applied judicial estoppel in similar factual circumstances.[6] McNemar cites only one

6. *See* Second Circuit: *Simon v. Safelite Glass Corp.*, 943 F. Supp. 261 (E.D.N.Y. 1996); Fourth Circuit: *Hindman v. Greenville Hosp. Syst.*, 1996 WL 697739 (D.S.C. Nov. 20, 1996); Fifth Circuit: *Harris v. Marathon Oil Co.*, 1996 WL 726418 (W.D. Tex. Feb. 14, 1996); Sixth Circuit: *Griffith v. Wal-Mart Stores, Inc.*, 930 F. Supp. 1167 (E.D. Ky. 1996); Seventh Circuit: *Bollenbacher v. Helena Chem. Co.*, 934 F. Supp. 1015 (N.D. Ind. 1996); Eighth Circuit: *Johnson v. U.S. Steel Corp.*, 943 F. Supp. 1108 (D. Minn. 1996); Ninth Circuit: *Miller v. U.S. Bancorp*, 926 F. Supp. 994 (D. Ore. 1996); Tenth Circuit: *Cline v. Western Horseman, Inc.*, 922 F. Supp. 442 (D. Colo. 1996);

case — a district court decision in the Eleventh Circuit — where a court has specifically eschewed application of judicial estoppel on facts similar to those presented here, *Dockery v. North Shore Medical Center,* 909 F. Supp. 1550 (S.D. Fla. 1995). But, as McNemar acknowledges in his Petition, the Eleventh Circuit Court of Appeals has not itself addressed the issue of whether judicial estoppel would apply in these circumstances. Other district courts in the Eleventh Circuit, however, contrary to *Dockery,* have directly applied judicial estoppel in similar cases. *See, e.g., Taylor v. Food World, Inc.,* 1996 WL 705952 (N.D. Ala. Dec 5, 1996); *Fussell v. Georgia Ports Auth.,* 906 F. Supp. 1561 (S.D. Ga. 1995). Moreover, even the *Dockery* decision is consistent with the case at bar in that the district court *granted* summary judgment for the employer because the uncontradicted evidence of record, including admissions in plaintiff's benefits applications, established that she was unable to work at the relevant time and, therefore, could not establish a *prima facie* case under the ADA.

McNemar's argument that there are differences in the circuits on the precise contours of the doctrine of judicial estoppel is insufficient and unavailing. It is at best merely speculative to assert, as he does, that these variations would produce conflicting results on the particular facts of the present case. To the contrary, courts are likely to reach the same result even in those circuits where the doctrine is not applied.[7] Moreover, it is recognized in every circuit that a party cannot create a

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Smith v. Midland Brake, Inc., 911 F. Supp. 1351 (D. Kan. 1995); Eleventh Circuit: *Taylor v. Food World, Inc.,* 1996 WL 705952 (N.D. Ala. Dec 5, 1996); *Fussell v. Georgia Ports Auth.,* 906 F. Supp. 1561 (S.D. Ga. 1995).

7. The only circuits which do not recognize the doctrine are the Tenth Circuit and the District of Columbia Circuit. *See Chrysler Credit Corp. v. Country Chrysler, Inc.,* 928 F.2d 1509 (10th Cir. 1991); *Konstantinidis v. Chen,* 626 F.2d 933 (D.C. Cir. 1980). However, in these circuits district courts have applied the law of estoppel in circumstances similar to those presented here. *See, e.g., Cline v. Western Horseman, Inc.,* 922 F. Supp. 442 (D. Colo. 1996); *Smith v. Midland Brake, Inc.,* 911 F. Supp. 1351 (D. Kan. 1995); *Nguyen v. IBF, Inc.,* 905 F. Supp. 1471 (D. Kan. 1995); *Garcia-Paz v. Swift Textiles, Inc.,* 873 F. Supp. 547 (D. Kan. 1995).

genuine issue of material fact under Rule 56 by contradicting, without satisfactory explanation, his or her own prior sworn statements.[8]

In sum, there is no conflict and no basis for the exercise of certiorari review.

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8. *See Pyramid Securities, Ltd. v. I.B. Resolution, Inc.*, 924 F.2d 1114 (D.C. Cir.), *cert. denied*, 502 U.S. 822 (1991); *Franks v. Nimmo*, 796 F.2d 1230 (10th Cir. 1986); *see also Bank of Illinois v. Allied Signal Safety Restraint Syst.*, 75 F.3d 1162 (7th Cir. 1996); *Colantuoni v. Alfred Calcagni & Sons, Inc.*, 44 F.3d 1 (1st Cir. 1994); *Sinskey v. Pharmacia Ophthalmics, Inc.*, 982 F.2d 494 (Fed. Cir. 1992), *cert. denied*, 508 U.S. 912 (1993); *Kennedy v. Allied Mutual Ins. Co.*, 952 F.2d 262 (9th Cir. 1991); *Hackman v. Valley Fair*, 932 F.2d 239 (3d Cir. 1991); *Rohrbough v. Wyeth Labs, Inc.*, 916 F.2d 970 (4th Cir. 1990); *Farrell v. Automobile Club of Michigan*, 870 F.2d 1129 (6th Cir. 1989); *Mack v. United States*, 814 F.2d 120 (2d Cir. 1987); *Albertson v. T.J. Stevenson & Co., Inc.*, 749 F.2d 223 (5th Cir. 1984); *Van T. Junkins and Assoc., Inc. v. U.S. Industries, Inc.*, 736 F.2d 656 (11th Cir. 1984).

CONCLUSION

Passion and emotion cannot supply the basis McNemar's Petition lacks. The decision affirmed below was made upon a fact-specific inquiry, and the law was properly applied. Petitioner's belated constitutional and conflict arguments are inappropriate and incorrect, and his Petition should be denied.

Respectfully submitted,

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RESPONDENT'S APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

LEONARD C. McNEMAR, *Appellant,*	:	
vs.	:	No. 95-1590
THE DISNEY STORE, INC., *Appellee.*	:	

Oral Argument held in the above-captioned matter on Tuesday, June 11, 1996, at the United States Courthouse, The Albert Branson Maris Courtroom, 601 Market Street, Philadelphia, Pennsylvania, transcribed stenographically from an audiotape recording by Dennis Corsi, Registered Professional Reporter.

BEFORE:

RUGGERO J. ALDISERT, Senior Circuit Judge
WALTER K. STAPLETON, Circuit Judge
MORTON I. GREENBERG, Circuit Judge

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Counsel for EEOC

December 2nd. I want to take this –

MR. EPSTEIN: They're all December 2nd.

THE COURT: See, it's hard for me. You're much brighter than I. It's difficult for me to follow, you know, your sophisticated argument, counsel. You'll have to bear with me. Okay?

I want to know where in the record he notified the Social Security Administration that, having said he was disabled, that he was no longer disabled.

MR. EPSTEIN: He did so in the initial applications, Your Honor, on pages A-174 through 177 in his SSI application and A-985 through 988 in his SSDI application.

THE COURT: You know what I couldn't understand; what all the discussion in the briefs about reasonable accommodations have to do with this case because it doesn't seem to me to have anything to do with it because this is not a case over an argument of whether there was accommodations.

MR. EPSTEIN: No, sir. He always was able to work. He was able to work on the day that they fired him.

THE COURT: So he didn't need reasonable accommodations?

MR. EPSTEIN: He needed no accommodations, sir.

THE COURT: That clears that up for me. The other question: I'm not clear from the record, and maybe it's not in here and maybe it doesn't matter, he did apply for New Jersey disability payments, and he applied for relief from a loan obligation in Pennsylvania for education. Does the record tell us whether he received those benefits?

MR. EPSTEIN: He received those benefits, Your Honor.

THE COURT: He did receive them. And he's still on Social Security now; is that right?

MR. EPSTEIN: He's presently on Social Security. The record also reflects that he has continued to seek employment without success.

THE COURT: He had to be capable of doing this job on the day they fired him, I presume, and you don't say, and we're not involved then with whether he could do it with reasonable accommodations. He could do it straight out.

MR. EPSTEIN: Absolutely, and was doing

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-1590

LEONARD C. MCNEMAR,

Appellant,

v.

THE DISNEY STORES, INC.,

Appellee.

(On Appeal from the United States District Court
for the Eastern District of Pennsylvania,
Civil Action No. 94-6997)

BRIEF OF APPELLANT

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DATED: December 5, 1995

STATEMENT OF THE ISSUES

1. Did the district court err by applying the doctrine of judicial estoppel to foreclose an employee with AIDS from protection under the Americans with Disabilities Act, the New Jersey Law Against Discrimination, and the Employee Retirement Income Security Act because he had applied for and was awarded disability benefits following the discriminatory termination of his employment on the basis of his disability?

2. Did the district court err in dismissing an employee's claim for invasion of privacy as a matter of law where the employer confronted the employee, after hearing rumors that he had AIDS, questioned him on his health status, and disclosed to others, without his consent, that he had AIDS?

3. Did the district court err in dismissing an employee's claim for intentional infliction of emotional distress as a matter of law where his employer falsely accused him of theft so that it could fire him, eliminate its medical benefit obligations to him, and avoid public reaction to having a manager with AIDS working at a high profile Disney store?

No. 95-1590

United States Court of Appeals
for the
Third Circuit

LEONARD C. MCNEMAR,
Plaintiff-Appellant,

v.

THE DISNEY STORES, INC.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF AMICUS CURIAE OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF PLAINTIFF-APPELLANT

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STATEMENT OF THE ISSUE

Did the district court err by applying the doctrine of judicial estoppel to foreclose an employee with AIDS from suing under the Americans With Disabilities Act because he had applied for and was awarded disability benefits following the discriminatory termination of his employment on the basis of his disability?[2]

2. There are other issues on appeal which this brief does not address.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-1590

LEONARD C. MCNEMAR,

Appellant,

v.

THE DISNEY STORES, INC.,

Appellee.

(On Appeal from the United States District Court
for the Eastern District of Pennsylvania,
Civil Action No. 94-6997)

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OF COUNSEL AND ON THE BRIEF

DATED: January 8, 1996

STATEMENT OF THE ISSUES

Did the District Court err in applying the doctrine of judicial estoppel, at the summary judgment stage, to bar, as a matter of law, a plaintiff's claim of handicap discrimination under the NJLAD when the courts of New Jersey have rejected the use of this doctrine in similar situations and where substantial evidence existed in the record from which a reasonable jury could have found that the plaintiff was able to continue working?

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1590

LEONARD C. MCNEMAR,

v.

THE DISNEY STORES, INC.

Leonard C. McNemar,
Appellant.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF THE APPELLANT

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STATEMENT OF THE ISSUE

Whether the district court erred in ruling that the plaintiff's representation, in a post-termination benefits application, that he was "totally and permanently disabled" provided an absolute defense to the plaintiff's claim of unlawful discharge under the ADA.